

2010

Westgate Resorts v. Shaun S. Adel and Consumer Protection Group, LLC : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff/Appellee,

v.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants/Appellant.

Case No. 20101017-SC

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HON. LYNN DAVIS, CIVIL NO. 020404068
DECISION DATED DECEMBER 13, 2010

BRIEF OF APPELLANT

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**FILED
UTAH APPELLATE COURTS**

MAY 18 2011

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the court below are identified in the caption on appeal.

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JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED

Issue 1: Is the order from which the petition is brought subject to direct appeal pursuant to Utah Code Ann. §78B-11-129 or, does it otherwise constitute a final judgment for purposes of appeal?

Standard of Review: The interpretation of a statute is a question of law. *State v. Jeffries*, 2009 UT 57, ¶ 8, 217 P.3d 265.

Preservation: This issue was raised by this Court in its Order of March 2, 2011, provisionally granting the petition for interlocutory appeal.

Issue 2: Does this Court have jurisdiction to review the order pursuant to Rule 5 of the Rules of Appellate Procedure?

Standard of Review: “[T]he interpretation of a rule of procedure is a question of law.” *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540.

Preservation: This issue was raised by this Court in its Order of March 2, 2011, provisionally granting the petition for interlocutory appeal.

Issue 3: Did the District Court err in ruling that an undisclosed first-cousin relationship between Richard Burbidge and George Burbidge, without more, required vacatur of the arbitration award?

Standard of Review: The interpretation of a statute is a question of law, reviewed for correctness. *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201.

Preservation: This issue was raised and addressed below in the parties' briefing at R. 5830-5909, 5916-5982, 6013-6076, and in the trial court's memorandum decision and order (Exh. 1).

Issue 4: Did the District Court err in failing to deny Westgate's motion to vacate on grounds of waiver?

Standard of Review: Questions of whether waiver has occurred when facts are not in material dispute are questions of law. *B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc.*, 754 P. 2d 99, 101 and Note 1 (Utah Ct. App 1988). Questions of law are reviewed for correctness. *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201.

Preservation: This issue was raised and addressed below in the parties' briefing at R. 5916-5982, 6013-6076, and in the trial court's memorandum decision and order (Exh. 1, p. 8).

DETERMINATIVE STATUTES

Utah Code Ann. § 78B-11-113. Disclosure by arbitrator.

(1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(a) a financial or personal interest in the outcome of the arbitration proceeding; and

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(2) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(3) If an arbitrator discloses a fact required by Subsection (1) or (2) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Subsection 78B-11-124(1)(b) for vacating an award made by the arbitrator.

(4) If the arbitrator did not disclose a fact as required by Subsection (1) or (2), upon timely objection by a party, the court under Subsection 78B-11-124(1)(b) may vacate an award.

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b).

(6) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under Subsection 78B-11-124(1)(b).

Utah Code Ann. § 78B-11-124. Vacating an award.

(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator;

(ii) corruption by an arbitrator; or

(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(d) an arbitrator exceeded the arbitrator's authority;

(e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the arbitration hearing; or

(f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to Section 78B-11-120 or within 90 days after the movant receives notice of a modified or corrected award pursuant to Section 78B-11-121, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(3) If the court vacates an award on a ground other than that set forth in Subsection (1)(e), it may order a rehearing. If the award is vacated on a ground stated in Subsection (1)(a) or (b), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in Subsection (1)(c), (d), or (f), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Subsection 78B-11-120(2) for an award.

(4) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

Utah Code Ann. § 78B-11-129. Appeals.

(1) An appeal may be taken from:

- (a) an order denying a motion to compel arbitration;
- (b) an order granting a motion to stay arbitration;
- (c) an order confirming or denying confirmation of an award;
- (d) an order modifying or correcting an award;
- (e) an order vacating an award without directing a rehearing; or
- (f) a final judgment entered pursuant to this chapter.

(2) An appeal under this section must be taken as from an order or a judgment in a civil action.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

Westgate filed its initial lawsuit in this case on September 19, 2002. (R. 0011.) In March 2004, CPG was granted leave to and did file a counterclaim asserting, *inter alia*, claims against Westgate under the Utah Pattern of Unlawful Activity Act (UPUAA). (R. 2755.)

Four years later, approximately three months before the UPUAA claims were to be tried, Westgate filed a motion to compel arbitration of the claims by virtue of a provision of the UPUAA stating that such claims are “subject to” arbitration. (R. 3057.) Over CPG’s objection, on October 27, 2008, the trial court granted Westgate’s motion, and ordered the UPUAA claims into arbitration. (R. 4718.)

The trial court’s order specified a procedure regarding selection of arbitrators (R. 4718), which the parties followed: Each party first selected an arbitrator. Westgate selected Judith M. Billings, CPG selected Richard D. (Dick) Burbidge, and the two of them then selected Paul S. Felt as the neutral. Those three arbitrators comprised the “Panel.” (R. 5954.)

After the appointments, Westgate sent an ex parte communication with material to its designee. (R. 5922-5924.) Upon learning about it, CPG objected to such ex parte communications, arguing that communications from parties should be shared with counsel and all arbitrators. *Id.*

The Panel, meanwhile, proceeded with the arbitration. On February 20, 2009, the Panel issued a Pre-Arbitration Order and Hearing Notice, ordering the parties to perform a number of actions prior to, and to appear at, a pre-arbitration hearing to be held March 27, 2009. (R. 5955.) At the March hearing, the Panel presented for signature an “Arbitration Fee Agreement,” which included a provision stating that all arbitrators considered themselves neutral. (R. 5831.)

After a year of discovery and various motions, the arbitration hearing took place December 7-11, 2009, and January 22, 2010.

On February 2, 2010, the Panel issued unanimous Findings of Facts, Conclusions of Law and Award (“Arbitration Award”). (R. 5935-5947.) The Panel found by clear and convincing evidence that Westgate had made false and fraudulent representations, and non-disclosures with the intent to mislead or with reckless indifference to the truth. (R. 5942, ¶ 10, R. 5939, ¶ 23.) The Panel also found that the actions of Westgate constituted a scheme or artifice to defraud within the meaning of Utah Code Ann. § 76-10-1801, and that the scheme constituted a pattern of unlawful activity within the meaning of Utah Code Ann. § 76-10-1602. (R. 5942, 10, R. 5941, ¶ 15.)

The Panel awarded \$65,500 on the UPUAA claims. (R. 5937.) CPG then submitted a motion for attorney fees pursuant to UPUAA, and a motion in the District Court to confirm the first arbitration award and certify it as final under U.R.Civ.P. 54(b). (R. 5797.) Westgate moved to vacate the award. (R. 5909.)

Westgate’s sole objection to the award was that arbitrator Richard Burbidge had failed to disclose that he is one of 22 first cousins of George W. Burbidge II, a shareholder at Christensen & Jensen, the law firm representing CPG. Westgate’s principal argument was that, although Arbitrator Burbidge was a party appointee, by voluntarily considering himself “neutral” after his appointment, he had subjected himself to disclosure requirements applicable to arbitrators designated as neutral by statute. (R. 5984-5903.)

Westgate did not claim to have any evidence of actual impropriety by Richard Burbidge, and the evidence was uncontested that Richard Burbidge and George Burbidge have no personal or social relationship.

CPG argued that voluntary and/or unilateral characterizations after appointment do not affect the status of party-appointed arbitrators nor the applicable disclosure standards, but that, in any event, the mere existence of a first-cousin relationship without more was insufficient to vacate an award on non-disclosure grounds. Additionally, CPG argued that Westgate waived its right to seek recusal through its delay in raising its objection until after the Panel issued its award against Westgate. (R. 5961-5978.)

On December 13, 2010, the District Court entered an order vacating the arbitration award. The court ruled that the first-cousin relationship in itself was a fact that Richard Burbidge was required to disclose, because a reasonable person would consider that fact likely to affect the impartiality of the arbitrator. (Exh. 1, pp. 7-8.) The Trial Court concluded that Utah Code Ann. § 78B-11-113(1)(b) mandated disclosure, and that evident partiality was presumed under § 78B-11-113(5). The Court vacated the arbitration award under § 78B-11-124(1)(b)(i) and (iii). *Id.* at 8. Because the trial court vacated the award, CPG's motion to confirm was rendered moot. As acknowledged by all parties, under the trial court's order, the matter in arbitration is to be reheard by a new panel of arbitrators. (*See* pp. 13-14, *infra.*)

CPG petitioned for permission to appeal from the trial court's order on December 22, 2010. The Court granted the petition provisionally, directing the parties to address two threshold issues in connection with briefing on the merits, 1) whether the order from which the petition is brought is subject to direct appeal pursuant to Utah Code Ann. §78B-11-129 or otherwise constitutes a final judgment for purposes of appeal; and 2)

whether this Court has jurisdiction to review the order pursuant to Rule 5 of the Rules of Appellate Procedure.

Facts

The following facts were uncontroverted below (R. 5979-5980; *see also* R. 5982 (CPG's Opposition to Westgate's Motion to Vacate), and R. 6076 (Westgate's Reply)):

Richard D. Burbidge is a first cousin of George W. Burbidge II, one of 22 first cousins.

[George W. Burbidge is] a shareholder in Christensen & Jensen.

Due to a large disparity in ages between their fathers, Richard D. Burbidge is a generation older than George W. Burbidge. (Richard D. Burbidge is 61 years old; George W. Burbidge II is 42.)

Richard Burbidge and George Burbidge have no close familial relationship, have no active social relationship, do not speak with each other regularly, have no business relationship with each other, and have no personal connection outside their familial relationship. They have not spoken in many months. They last spoke for a minute when they happened to bump into each other during the Utah Bar Convention in Sun Valley, Idaho, in June, 2009. Previously, they both attended the funeral of an aunt in March, 2009.

The law firms at which Richard Burbidge and George Burbidge are associated have been adverse to each other in litigation, and Richard Burbidge and George Burbidge have been adverse to each other in litigation.

George Burbidge has had no involvement in the Westgate case. His financial interest in any recovery by other shareholders in the firm is indirect.

George Burbidge has never asked for, discussed, received, or expected in any way any financial support or benefit from any of his 22 first cousins, including Richard Burbidge. The notion that Richard Burbidge would be influenced by an indirect interest in facilitating George Burbidge's indirect interest in a recovery, or vice versa, is unreasonable.

Westgate does not claim that any actual conflict existed on the part of Richard D. Burbidge, or that he evidenced any partiality in the proceedings.¹

SUMMARY OF THE ARGUMENT

The trial court's order is not subject to immediate appeal pursuant to Utah Code Ann. § 78B-11-129. None of the grounds specified by statute for such an appeal is present: The order did not deny a motion to compel arbitration, did not stay arbitration, did not modify or correct an award, and was not a final judgment. While the order technically resulted in a denial of confirmation, as the trial court recognized, that was solely a result of the order having already been vacated through the granting of Westgate's motion – in essence, there was no award to confirm. Under § 129(e), appeal from an order of vacatur is expressly *not* permitted if the vacatur contemplates a rehearing, as all parties agree occurred in this case.

Even if one of the grounds for appeal under § 129 had been present, the statute indicates that the taking of such appeal is permissive, rather than mandatory. This Court

¹ Westgate counsel: “We’ve never made an accusation that Mr. Burbidge did anything untoward in connection with discharging his duties as an arbitrator, other than failing to make these disclosures. Again, as the Court pointed out in its synopsis of the – of CPG’s position, we’ve never used the undue means or fraud trigger under the – under Section 125. We’ve never brought that up. That’s not part of it. The only one that we’ve invoked is the evident partiality. That is only because in Section 113 the presumption of evident partiality is created by the failure to make that disclosure. So we’ve never professed, and we agreed to this in the reply, that we’re making a factual showing that Mr. Burbidge engaged in fraud or undue means or there was evident partiality as a matter of objective evidence or proof. We’ve not pointed to anything he said or did during the proceedings or anything like that.” (Exh. 2, Transcript of Hearing, August 4, 2010, pp. 30-31.)

has consistently recognized a distinction between permissive (“may” appeal) and mandatory language (“shall”). Thus, CPG would not have been required to pursue an appeal pursuant to § 129; it was permitted to seek review through other permissible means, such as a petition for interlocutory review.

The Court has jurisdiction over the appeal pursuant to Utah Rule of Appellate Procedure 5; the petition was filed within 20 days of a non-final order. Moreover, even if the rules governing the filing of a notice of appeal from a final judgment had been applicable, the filing of the Rule 5 petition less than 30 days after entry of the order would have had the effect of such a notice under U.R.A.P. 3 and 4. *Cedar Surgery Center, LLC v. Bonelli*, 2004 UT 58, ¶¶ 10-12, 96 P.3d 911.

With respect to the merits, the trial court erred in its interpretation of the disclosure requirements of the Utah Arbitration Act. Under the Act, “neutral” arbitrators are subject to certain disclosure requirements that do not apply to “party” appointees. Assuming for purposes of argument that Richard D. Burbidge was a neutral rather than party appointee, the trial court erred in two respects:

First, the court erred in ruling that a first-cousin relationship between an arbitrator and an attorney whose firm represents one of the parties – 19 years apart in age, with no existing personal, social, or financial relationship – is, without more, a “substantial relationship with a party.” The trial court’s ruling misreads the statute, which requires disclosure not of “relationships” but only of “substantial” relationships.

Further, even if the genetic relationship alone could be deemed a substantial relationship, under the statute, the non-disclosure of such relationship does not mandate vacatur, as the trial court “reluctantly” believed. Rather, the statute provides only that non-disclosure creates a “presumption” of “evident partiality.” There is no indication in the statute that the presumption is irrebuttable – indeed, had the legislature so intended, it would simply have included non-disclosure to the list of grounds for automatic vacatur.

In this case, the presumption was uncontrovertibly rebutted: Evidence of the lack of any partiality, “evident” or otherwise, and of the lack of any meaningful relationship at all, was undisputed. Westgate conceded as much, acknowledging that its sole argument for vacatur was that the presumption was irrebuttable.

The trial court not only erred in interpreting the disclosure standard applicable to neutral appointees, but it erred in applying that standard in the first instance, because Mr. Burbidge was a party appointee, not a neutral appointee. By order of the trial court (and custom), each party selected one arbitrator, and those two arbitrators then appointed a neutral. Mr. Burbidge was a party appointee, and both the Arbitration Act and case law distinguish between such appointees and a designated neutral. The fact that, after the arbitration process had already begun, the Panel unilaterally considered themselves neutral does not retroactively alter the nature of the appointment.

As a party appointee, Mr. Burbidge was required to disclose only relationships that “a reasonable person would consider *likely to affect the impartiality* of the arbitrator” Utah Code Ann. § 78B-11-113(1) (emphasis added). No such relationship exists here between Richard Burbidge and George Burbidge – indeed, their “relationship” is

markedly less developed than that between many unrelated attorneys. Moreover, even if their relationship was deemed to qualify under Section 113, vacatur was discretionary, not mandatory, as the trial court assumed. Under the undisputed facts of this case, vacatur would not have been a reasonable exercise of discretion even if the trial court had applied the correct standard.

Finally, the trial court should have considered CPG's argument that Westgate waived any right to object to Mr. Burbidge's participation or non-disclosures. Westgate itself admits that the only information it needed to discern the familial relationship was, literally, staring it in the face: the name of George Burbidge on Christensen & Jensen's letterhead. That name was on C & J's letterhead throughout the litigation and, in fact, the designation of Richard Burbidge had been submitted to Westgate's counsel on that same letterhead two years earlier. Waiver is a permitted argument under the Arbitration Act, and includes circumstances in which a party fails to act reasonably after actual or constructive knowledge of its grounds. Even assuming that Westgate did fortuitously notice George Burbidge's name for the first time shortly after an adverse ruling, the information was available to it the whole time.

ARGUMENT

I. THE TRIAL COURT'S ORDER IS NOT SUBJECT TO APPEAL PURSUANT TO § 129 OF THE ARBITRATION ACT, AND, IN ANY EVENT, APPEALS PURSUANT TO § 129 ARE PERMISSIVE, NOT MANDATORY.

Utah Code Ann. §78B-11-129 provides that an appeal may be taken from: “(a) an order denying a motion to compel arbitration; (b) an order granting a motion to stay arbitration; (c) an order confirming or denying confirmation of an award; (d) an order modifying or correcting an award; (e) an order vacating an award without directing a rehearing; or (f) a final judgment entered pursuant to this chapter.”

None of the bases for appeal listed in §129 is applicable to this matter. The Ruling and subsequent Order did not deny a motion to compel arbitration, stay arbitration, or modify or correct the award. The trial court observed that if it granted the motion to vacate, it was not required to issue an order confirming the award – there was, in fact, no award to confirm. (Exh. 1 at 7.) The trial court then granted Westgate’s motion to vacate and denied CPG’s combined motion to confirm the award and to enter a final order under U.R.Civ.P. 54(b). (*Id.* at 8.) The trial court did not issue a final judgment, and denied CPG’s motion to certify the Order as final under U.R.Civ.P. 54(b). *Id.*

The parties and the trial court agree that the arbitration is to be reheard by a new panel unless this Court reverses the trial court’s Order. As acknowledged by Westgate in its opposition to CPG’s petition for interlocutory appeal, “The Order calls for re-arbitration of the case.” *Response in Opposition to Petition for Permission to Appeal from Interlocutory Appeal* at 7; see also *id.* at 8, 9 (“CPG’s right to arbitrate its case in

front of a neutral and impartial panel is unaffected”), and 10 (“the District Court’s Order, which in the jargon, ordered a ‘do-over’”), and *Petition for Permission to Appeal from Interlocutory Order*, pp. 4, 6, 15 (“Unless interlocutory review is granted, the parties will be forced to start over in an arbitration that has already cost hundreds of thousands of dollars.”); also Exh. 2, Transcript of Hearing p. 34 (“[Westgate counsel]: What the statute says, though, is if you do vacate for evident impartiality, you order a rehearing. THE COURT: Sure.”) Because the trial court and both parties contemplate a rehearing of the arbitration, §78B-11-129(e) is not applicable.²

The trial court’s Order vacating the award appealed from here was not a final Order. This Court has made clear that “for an order or judgment to be final, it must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case. In other words, it must end the controversy between the litigants, leaving nothing for the court to do but execute the judgment.” *Powell v. Cannon*, 2008 UT 19, ¶ 11; 179 P. 3d 179 (citations omitted). If the Order is allowed to stand, the parties will face a new round of arbitration hearings with a new panel, new costs and fees, and a new round of testimony from the witnesses. Therefore none of the bases listed in §78B-11-129 is applicable.

² By statute, an order granting vacatur without a rehearing is typically reserved for grounds that, by their nature, preclude a subsequent rehearing of the arbitration. *See, e.g.*, Utah Code Ann. § 78B-11-124(3) (“If the court vacates an award on a ground other than that set forth in Subsection (1)(e) [that there was no agreement to arbitrate], it may order a rehearing. If the award is vacated on a ground stated in Subsection (1)(a) or (b) [evident partiality by an arbitrator appointed as a neutral], the rehearing must be before a new arbitrator.”)

However, even if grounds identified in § 78B-11-129 had been present, an immediate appeal under that section is permissive, not mandatory: “(1) An appeal may be taken...” §78B-11-129 provides a statutory avenue to appeal non-final orders, but does not mandate such appeals nor does it change interlocutory orders of a trial court into final orders. This Court and the Court of Appeals have consistently noted that “may” is a word of permission, not mandate. *See, e.g., In re Olympus Const., L.C.*, 2009 UT 29, ¶ 15, 215 P.3d 129 (“[Utah Code Ann. § 48-2c-] 1305 (1) provides, ‘A dissolved company in winding up may dispose of the known claims against it by following the procedures described in this section.’ (Emphasis added [by court].) Use of the provisions of this section is permissive rather than mandatory. That is, a dissolved company may elect to follow the procedures in this section or it may choose another route.”); *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 32, 63 P.3d 686 (“This use of ‘may’ is permissive, rather than mandatory”); *Glezos v. Frontier Investments*, 896 P.2d 1230 (Utah App. 1995) (“[U.R.A.P.] 10(a) provides: ‘Within 10 days after the docketing statement is served, a party may move: (1) To dismiss the appeal or the petition for review on the basis that the appellate court has no jurisdiction.’ Utah R. App. P. 10(a) (emphasis added [by court]). Rule 10(a) is permissive, not mandatory.”); *Pugh v. Dozzo-Hughes*, 2005 UT App. 203, ¶ 13, 112 P.3d 1247 (“a rule 38 motion to substitute parties on appeal is permissive, not mandatory. *See* Utah R. App. P. 38(a) (stating another “party may be substituted as a party” by motion (emphasis added [by court])).”)³

³ That is only logical: Any other reading would compel an immediate appeal when it

II. THE COURT HAS JURISDICTION OVER THE APPEAL.

This Court has jurisdiction to hear interlocutory appeals pursuant to Utah Code Ann. § 78A-3-102(3)(j). Rule 5(a) provides that an appeal from an interlocutory order may be sought within 20 days after the entry of the order. U.R.A.P. 5(a). This Court has explained that “no finality will be ascribed to a memorandum decision or minute entry for purposes of triggering the running of the time for appeal until the prevailing party prepares and submits a proposed order.” *Houghton v. Dept. of Health*, 2008 UT 86, ¶ 11; 206 P. 3d 287; citing to *Code v. Dept. of Health*, 2007 UT 43, ¶ 9, 162 P.3d 1097.

In this matter, the trial court issued a Ruling on September 30, 2010, and directed Westgate to prepare an order consistent with the opinion. The Order prepared by Westgate was signed and entered on December 13, 2010. (Exh. 1.) Because the trial court’s Order vacating the award while contemplating a rehearing was not appealable, CPG filed its Petition for interlocutory appeal on December 22, 2010, well within the 20 days allotted by Rule 5(a). Therefore the Petition was timely and the Court has jurisdiction.

Even if the Court were to hold that an appeal pursuant to § 78B-11-129 is an appeal as of right, the Petition for interlocutory appeal was also timely pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedures. In *Cedar Surgery Center, LLC. v. Bonelli*, this Court held that a petition for interlocutory appeal was sufficient to provide

might not otherwise be necessary or desired, sacrificing judicial economy and potentially causing additional delay. For example, a party might choose not to appeal immediately an order staying an arbitration if it felt that a resolution of remaining non-arbitrable issues would resolve the case more quickly (and/or at less expense).

proper notice of appeal when it had been filed within the 30 days mandated by Rule 4a. *Cedar Surgery Center, LLC. v. Bonelli*, 2004 UT 58, ¶¶ 10-12; 96 P. 3d 911. Given the timing of the petition in *Bonelli*, this Court concluded it did not need to decide if the district court's order was final. Likewise here, if the Court were to decide that an appeal in this case pursuant to §78B-11-129 was mandatory the Court should apply the rationale of *Bonelli* that "when determining whether a notice of appeal is sufficient, we look to the substance of the notice-not its caption." *Id.* at ¶ 12.

Applying *Bonelli* to the situation here is reasonable because a statutory right of appeal, as that established in § 78B-11-129, is clearly in addition to an appeal from a final order or from an order certified pursuant to Rule 54 of the Utah Rules of Civil Procedures. In *Pledger v. Gillespie*, this Court observed that the Utah Arbitration Act confers jurisdiction over the enunciated factors "regardless of whether the order is a final judgment or has otherwise been designated as final by the district court under Rule 54(b)." *Pledger v. Gillespie*, 1999 UT 54 ¶ 17; 982 P. 2d 572. Indeed, when, as here, the district court issues an order pursuant to the Utah Arbitration Act vacating a mediation award while undoubtedly contemplating a rehearing of the arbitration, that Order is more akin to an interlocutory order than either a final order or one certified under Rule 54.

Although this Court has refused to apply the reasoning of *Bonelli* in a situation where the district court had certified the order as final pursuant to U.R.C.P. 54, thus creating a truly final order, the trial court here did not certify its Order pursuant to Rule 54. *See Clark v. Archer*, 2010 UT 57; 242 P. 3d 758 (when a judgment is certified as final under rule 54(b) of the Utah Rules of Civil Procedure, an appellant must file an

appeal as of right under rules 3 and 4 of the Utah Rules of Appellate Procedure). In *Clark v. Archer*, the Court explained that “presumptively final judgments provide clear direction to an appellant as to the proper procedures to follow under rules 3 and 4 of the Utah Rules of Appellate Procedure.” *Id* at ¶ 13. The district court’s Order in this case is not a presumptively final judgment; the first and principle ruling of the trial court was vacatur, the denial of the other pending motions was an automatic side effect of the vacatur. Based upon the trial court’s order, § 78B-11-129 does not prescribe the method of appeal or give clear direction to appellants.

Section 78B-11-129(2) provides that “an appeal under this section must be taken as from an order or a judgment in a civil action.” Of course, orders can be final orders or interlocutory in nature, and it is the nature of the order which determines if a party should bring an appeal under Rules 3 and 4 or Rule 5 of the Utah Rules of Appellate Procedure. In this matter the district court’s order was neither a final order nor one certified pursuant to U.R.C.P. 54. Therefore CPG was warranted in bringing its appeal as an interlocutory appeal and this Court has jurisdiction.

III. THE TRIAL COURT’S INTERPRETATION OF THE DISCLOSURE PROVISIONS OF THE ARBITRATION ACT WAS ERRONEOUS.

More than eight and one half years since litigation began, more than six years since Christensen & Jensen made an appearance in the litigation, more than two years since arbitration was compelled, and after the expenditure of hundreds of hours of attorney time and nearly \$150,000 in arbitrator fees alone, the parties face having to re-arbitrate if the trial court’s interpretation of the Arbitration Act is permitted to stand.

Moreover, under the trial court's order, all of the work of the prior panel, including rulings on numerous motions and discovery disputes, will be of no legal effect and the parties will have to begin from scratch.⁴

It is because of consequences like this – the antithesis of an expedient and cost-effective resolution – that the burden for vacating an arbitration award in Utah is steep. This Court has explained that “a motion to vacate or modify an arbitration award is limited to determining whether any of the very limited grounds for modification or vacatur exist.” *Pacific Development, L.C. v. Orton*, 2001 UT 36, ¶6, 23 P. 3d 1035 (citing *Buzas Baseball v. Salt Lake Trappers*, 925 P. 2d 941, 947 (Utah 1996)).

As discussed *infra*, CPG takes issue with the trial court's ruling that Richard Burbidge was a “neutral” appointee under the Utah Arbitration Act. However, even assuming that he was, the trial court erred in two central respects, either of which requires reversal. Understanding the nature of the error requires articulation of the relationship among the two disclosure provisions in the Act, one of which applies only to neutrals, and the other of which applies to both neutral- and party-appointees. As discussed herein, the trial court erred under either standard.

Neutral appointees are subject to a disclosure requirement in the Act that does not apply to party appointees. Utah Code Ann. § 78B-11-113(5) states that a neutral appointee who does not disclose a “known, existing, and substantial relationship with a party” is presumed to act with evident partiality:

⁴ Additionally, only portions of the arbitration proceeding were recorded. Consequently, several live witnesses will have to be brought in again.

An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b).

Section 78B-11-124(1)(b), in turn, provides:

Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

* * *

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator.

In interpreting these provisions, the trial court erred in a couple of respects, either of which requires reversal. First, it erroneously interpreted “substantial relationship” as including first-cousin relationships unaccompanied by any personal, social, or financial relationship. Second, it erroneously assumed that the presumption of evident partiality was irrebuttable, when all evidence – and Westgate’s own concession – was that no partiality was evidenced by Arbitrator Burbidge.

A. Richard Burbidge’s first-cousin relationship with George Burbidge, without more, was not a “substantial relationship” with a party.⁵

The legislature did not define “substantial relationship” within the Arbitration Act, and this Court need not do so now. It is enough that the (non)relationship in this case does not qualify. From the plain language of the statute, it is self-evident that a

⁵ CPG does not dispute that Richard Burbidge’s consanguinity with George Burbidge was a “known” and “existing” relationship. Consequently, this discussion focuses on whether it satisfied the third element, a “substantial” relationship with a party.

“relationship” in itself is insufficient to implicate Section 78B-11-113(5); it must be “substantial.”

This Court has warned against interpreting the Arbitration Act so as to impose an “appearance of impropriety” standard on arbitrators. In *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1255 (Utah 1994), the Court observed:

[A]s a matter of policy, we think an appearance-of-partiality standard sets an impractically low threshold, especially in a small state like Utah. Indeed, to disqualify any arbitrator who has professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all.⁶

Similarly, the Utah Ethics Advisory Committee has opined that the participation of a cousin may result in judicial disqualification under the (former) general Canon 3C(1) impartiality standard only “*if a close personal relationship exists.*” (R. 5920, Informal Opinion No. 89-5 (emphasis added).) The opinion, while not binding on the Court, supports the contention that a first-cousin relationship alone is not sufficient for disqualification even of a sitting judge – the genetic relationship must be accompanied by a personal or social relationship, which all parties agree is not present here.

In short, being one of 22 cousins, with a 19-year age gap, with virtually no personal interaction – in fact, less of a social relationship than many unrelated attorneys – and no financial connection, cannot reasonably be construed as a “substantial”

⁶ The Court’s observation regarding the effect of the size of the legal community and jurisdiction is fitting here: Particularly with Utah’s large families and unique heritage, it would be hard to find a law firm in town that does not have a Christensen, Jensen, Snow, Burbidge, etc.

relationship. *See, e.g., Washburn v. McManus*, 895 F. Supp 392, 399 (D. Conn. 1994) (“The mere fact of a prior relationship is not in and of itself sufficient to disqualify arbitrators. The relationship between the arbitrator and the party’s principal must be so intimate – personally, socially, professionally, or financially – as to cast serious doubt on the arbitrator’s impartiality”).

In *Morelite Construction Corp. v. NY City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2nd Cir. 1984), cited approvingly by this Court in *DeVore*, the Second Circuit upheld the disqualification of an arbitrator whose son was president of the Union, a district chapter of which was a party to the arbitration. However, the court narrowed its ruling and observed that

[w]e need not, and do not, attempt to set forth a list of familial or other relationships that will result in the per se vacation of an arbitration award, except to suggest that such a list would most likely be very short. We do not intend to hold arbitrators to all the standards of Canon 3. 748 F.2d at 85.

The court also predicted post arbitration “sour grapes” by losing parties, stating that “[n]either do we intend that unsuccessful parties to arbitration may have awards set aside by seeking out and finding tenuous relationships between the arbitrator and the successful party.” *Id.* As a California court stated recently,

[t]he test is an objective one – whether such an impression is created in the eye of the hypothetical reasonable person. Thus, unless a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the arbitrator’s impartiality, the arbitrator is not subject to disqualification.

Mahnke v. Superior Court, 180 Cal. App. 4th 565, 579, 103 Cal. Rptr. 3d 197, 206 (2009). In this matter, a reasonable person, aware of the facts, would not fairly entertain doubts regarding the impartiality of Richard Burbidge.⁷

B. The uncontroverted evidence rebutted the presumption of evident partiality in any event.

Westgate successfully argued below that Richard Burbidge's failure to disclose the first-cousin relationship with George Burbidge "is both statutorily presumed to constitute evident partiality and is, in fact, evident partiality" (R. 5909 at 15; *also* Exh. 2, p. 31 ("It's the presumption, which the statute does not say is rebuttable. . . . We're saying it is, you know, an irrebuttable presumption of evident partiality which mandates vacatur here under the statute.")).)

But as CPG pointed out, presumptions are just that, presumptions. *See, e.g.*, Exh. 2, pp. 38-39 ("[A] presumption is always rebuttable unless stated otherwise. Courts often refer to it as a balloon. That the balloon is the presumption, and as soon as evidence is presented contrary to the presumption, the balloon pops."); U.R.E. 301(1); *Burns v.*

⁷ Both Westgate and the Trial Court relied on a 1968 U. S. Supreme Court opinion for the proposition that arbitrators are required to "disclose to the parties any dealings that might create an impression of possible bias." Exh 1 (court's ruling) at 8, *quoting Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).). However, this Court not only rejected that standard in *DeVore*, but expressly found reliance upon *Commonwealth* to be misplaced, noting that the quoted language "captured only three other votes," and that one of the concurring justices, "Justice White further concluded that an arbitrator cannot be expected to provide the parties with a complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where an arbitrator has a substantial interest in a firm which had done more than trivial business with a party, that fact must be disclosed." *DeVore*, 884 P.2d at 1255 n. 11 (brackets omitted).

Boyden, 2006 UT 14, ¶ 20, 133 P.3d 370; Richard C. Mangrum & Dee V. Benson, MANGRUM & BENSON ON UTAH EVIDENCE, at 101-102 (2009-2010 ed.) (“If the basic fact is established and evidence is presented challenging the presumed fact, then the presumption either disappears . . . or remains to allocate the burden of persuasion as to the nonexistence of the presumed fact”). *Contrast with Davis v. Provo City Corp.*, 2008 UT 59, ¶¶ 22-23, 193 P.3d 86 (applying statute in which legislature used term “conclusive presumption” and citing other statutes with that wording).

Indeed, that the presumption is rebuttable is self-evident in the statute. If the legislature had intended a failure to disclose a substantial relationship in itself to mandate vacatur, it would simply have listed such failure to disclose as a ground for mandatory vacatur under Section 78B-11-124(1), rather than creating a presumption in Section 78B-11-113(5).

CPG adduced affirmative, unrefuted evidence rebutting any inference of partiality, including the fact that no social, personal, or financial relationship existed, that a material difference in age existed, and that the two Burbidges and their firms have been adverse to each other in litigation. *See* pp. 3-4, *supra*. Moreover, Mr. Burbidge was one of three arbitrators, whose decision was unanimous, and who, while affording substantial relief to CPG, did reject portions of CPG’s claims. (*See* R. 5947.)

Once CPG adduced affirmative evidence rebutting the presumption, the burden fell upon Westgate to come up with something from which “a reasonable person would

conclude that an arbitrator, appointed as a neutral, showed partiality” *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1256 (Utah 1994).⁸

Westgate adduced no such evidence. In fact, counsel conceded that it had no such evidence to offer: “So we’ve never professed, and we agreed to this in the reply, that we’re making a factual showing that Mr. Burbidge engaged in fraud or undue means or there was evident partiality as a matter of objective evidence or proof. We’ve not pointed to anything he said or did during the proceedings or anything like that.” (Exh. 2, pp. 30-31.) (Emphasis added.)

As a matter of law, therefore, Westgate failed to meet the requirements of vacatur under Utah Code Ann. § 78B-11-124(1)(b). The appropriateness of this conclusion is illustrated by the Court’s application of a similar standard in *DeVore*. In that case, several years before the arbitration, the sole arbitrator (Mabey) had been an LDS stake president under whom an adverse witness served as bishop, a relationship that the trial court characterized as “significant and important.”

That relationship, without more, was insufficient for a reasonable person to find that the arbitrator showed partiality, this Court concluded. “There is no evidence in the record that this particular relationship has continued in any substantial way since 1980,”

⁸ Applying similar language in the predecessor to § 78B-11-124, the *DeVore*, this Court rejected a standard that would require a party seeking vacatur to prove *actual* partiality. However, the movant must prove that “a reasonable person would conclude that an arbitrator, appointed as neutral, *showed* partiality Furthermore, the burden of proof falls on the movant, and the evidence of partiality must be certain and direct, not remote, uncertain, or speculative.” *DeVore*, 884 P.2d at 1256 (emphasis added). There is no material difference between the “showed partiality” language construed in *DeVore* and the “evident partiality” language presently utilized in the Act. *Id.* at 1256 n. 12.

the Court noted. “Furthermore, there is no evidence in the record that Mabey continued to be, if indeed he ever was, influenced by his alleged love, respect, and admiration for [the witness]. The affidavits submitted by Dr. DeVore contain, at best, remote, uncertain, and speculative statements. . . . A reasonable person would not regard them as establishing certain and direct evidence for Mabey’s allegiance to [the witness] or any resultant partiality to IHCH.” 884 P.2d at 1257 (emphases added).

The Court further noted that “[t]here is no evidence in the record that Mabey did anything but use his best judgment to decide the issues of fact and law before him. That Mabey found IHCH’s arguments more persuasive than Dr. DeVore’s is not evidence of bias. Indeed, neither an arbitrator’s consistent reliance on the winning party’s evidence nor the arbitrator’s conclusion in the winning party’s favor establish partiality.” *Id.* at 1257. In this case, the trial court erred in assuming that a presumption of evident partiality would in itself compel mandatory vacatur, and in failing to recognize that the presumption had been rebutted by the uncontroverted evidence.

C. Although the arbitrators all considered themselves neutral and conducted themselves accordingly after their appointment, Mr. Burbidge was not a “neutral” appointee under the Arbitration Act.

Westgate argued that all three arbitrators in this matter were statutorily neutral, and the trial court considered Richard Burbidge as a “neutral” arbitrator under the statute. (Exh. 1, pp. 3, 8.) It is true that the Panel members decided after their appointment to consider themselves neutral, and conducted the proceeding accordingly. They then stated their understanding in an “Arbitration Fee Agreement” which the parties signed.

A post-appointment decision by arbitrators cannot retroactively transform the nature of their earlier appointment into the appointment of three statutory “neutrals” under the Utah Arbitration Act. Indeed, Westgate’s choice to forward copies of various court pleadings *ex parte* to “its” arbitrator contradicts the argument that it considered its chosen arbitrator, Judith Billings, to have been a “neutral” appointee.

The appointees in this matter acted in an objective, professional manner throughout the arbitration and, as discussed above, the same result would obtain regardless of whether the standards for “neutrals” applied to all three arbitrators. However, the trial court’s failure to address the legal distinction between a party-appointed arbitrator and an arbitrator-appointed arbitrator was error.

As ordered by the trial court in its Order Regarding Westgate Resorts LTD’s Motion to Compel Arbitration (R. 4714), the process utilized in appointing arbitrators in this case is familiar to anyone who litigates in Utah: each party appointed an arbitrator, and those two arbitrators appointed a neutral. In practice, attorneys are trained to be, and generally are, objective in their assessments of facts and law. Nonetheless, party-appointees are not “neutral” appointees under the Arbitration Act, and no party could reasonably claim otherwise.

The Utah Code indirectly recognizes different roles for party-selected arbitrators and for ‘neutral’ arbitrators. *See, e.g.,* Utah Code Ann. §§ 78B-11-112(2); 78B-11-113(5); 78B-11-124. Other courts have similarly recognized that subjecting party-selected arbitrators to the same disclosures and disqualification requirements is inconsistent with legislation recognizing the different roles. *See, e.g., Mahnke v.*

Superior Court, supra at 577-578; *Washburn v. McManus, supra* at 399 (some subjectiveness is tolerated and even expected from party-selected arbitrators); *Daiichi Hawaii Real Estate Corp. v. Lichter*, 82 P. 3d 411, 428 (Hawaii 2003) (“it stands to intuitive reason that a party-appointed arbitrator might view the proceeding through a more subjective and partial lens than a neutral arbitrator”); *Astoria Med. Group v. Health Ins. Plan Greater NY*, 182 N.E. 2d 85, 88 (1962) (“the very reason each of the parties contract for the choice of his own arbitrator is to make certain that his ‘side’ will, in a sense, be represented on the tribunal”); *Aetna Gas & Sur. Co. v. Grabbert*, 590 A. 2d 88, 92 (R.I. 1991) (“it would be inappropriate to require the party-appointed arbitrators to adhere to the same standard of neutrality as a judge. That standard ignores the practical realities of arbitration panels composed of party-appointed arbitrators”).

As appointees whom the parties had not designated as neutral prior to their appointment, Richard Burbidge and Judith Billings were subject to the general disclosure requirements of Section 78B-11-113(1), not the neutral-specific requirements of Section 78B-11-113(5) to which Paul S. Felt, the neutral choice of the other arbitrators, was subject. Accordingly, no presumption of evident partiality ever arose, and the trial court erred in vacating the award based upon such a presumption.

IV. THE TRIAL COURT ALSO ERRED IN CONCLUDING THAT A NON-DISCLOSURE UNDER UTAH CODE ANN. § 78B-11-113(1) HAD OCCURRED, AND THAT ANY SUCH NON-DISCLOSURE WOULD MANDATE VACATUR.

If, as CPG contends, Section 78B-11-113(5) has no bearing on this case, that leaves only one additional provision of the Utah Arbitration Act in play. Utah Code Ann.

§ 78B-11-113(1) is a general disclosure requirement that applies to all arbitrators, whether party-appointed or neutral. Because this standard encompasses arbitrators known to be non-neutral, it imposes a lower standard for disclosure than that for neutrals:

[78B-11-113(1)] Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

* * *

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

This provision does not require disclosure of a relationship at all unless “a reasonable person would consider [the relationship] likely to affect the impartiality of the arbitrator” (Emphasis added.) Moreover, even if such relationship is found, it does not mandate vacatur, as the lower court held; failure to disclose under § 78B-11-113(1) leaves vacatur to the court’s discretion:

[§ 78B-11-113(4)] If the arbitrator did not disclose a fact as required by Subsection (1) or (2), upon timely objection by a party, the court under Subsection 78B-11-124(1)(b) may vacate an award.

(Emphasis added.)

In citing Section 78B-11-113 as a basis for vacatur, the trial court erred in two respects: First, for the reasons discussed above, CPG submits that no reasonable person would conclude that the relationship at issue in this case was “likely” to affect Arbitrator Burbidge’s impartiality. The “any known facts that a reasonable person would consider”

must include not only the consanguine connection, but also the remote, nearly non-existent nature of the rapport between the arbitrator and his detached cousin. The statute places the duty to evaluate all the facts surrounding the situation on “an arbitrator, after making a reasonable inquiry.” Therefore, the arbitrator must evaluate not just the first cousin connection in a vacuum, but all the facts associated with that connection. To insist that Arbitrator Burbidge erred when he did not disclose his flimsy link to George Burbidge strips the statute of its clear meaning.

Second, even if a reasonable person could find such likelihood, it does not mandate vacatur, as the trial court (“reluctantly”) believed; rather, the issue is subject to the exercise of sound discretion. Because CPG adduced uncontroverted evidence that there was no tie between the Burbidges beyond shared ancestors, it would have been an abuse of discretion for the trial court to vacate the award under the standard applicable to party appointees. Consequently, it is appropriate on these undisputed facts for the Court to remand with directions to enter judgment in favor of CPG.

V. WESTGATE WAIVED ANY RIGHT TO OBJECT TO ARBITRATOR BURBIDGE’S PARTICIPATION.

As noted above, CPG argued that Westgate had waived any right to object to arbitrator Burbidge’s participation or the alleged non-disclosure. CPG argued that Westgate failed to raise an objection within a reasonable period after it knew or should have known of the grounds for the objection. CPG also argued that the court should

consider the arguably less-than-coincidental timing of the motion, *i.e.*, shortly after an unfavorable ruling was issued, a year and a half into the arbitration. (R. 5977.)⁹

The trial court ruled that, because Westgate filed its motion to vacate within 90 days of the issuance of the award (the prescribed deadline for such a motion), Westgate's filing was timely. (Exh. 1, p. 8.) But that was not CPG's argument. CPG agreed that Westgate's motion to vacate was filed within 90 days of the award. CPG argued, however, that Westgate had waived the grounds upon which vacatur was sought, because it did not object to arbitrator Burbidge's participation or alleged non-disclosure within a reasonable time of when it knew, or, in the exercise of reasonable diligence, should have known, of the perceived grounds. (R. 5975.)

If it was the trial court's intent to suggest that waiver cannot be argued under the Utah Arbitration Act, such interpretation would be inconsistent with a long line of case law to the contrary. *See ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2010 UT 65, ¶¶ 26-36, 245 P.3d 184, and cases cited. The trial court flatly erred in failing to address CPG's argument, and to consider whether a waiver by conduct had occurred, particularly given the post-award timing of Westgate's objection.

⁹ Temporal proximity has long been recognized as evidence of motive. *See, e.g., Vikrton v. Labor Commission*, 2001 UT App 394 fn 6 (“[n]ormally, a close temporal proximity between the protected conduct and the adverse employment action may justify an inference of retaliatory motive.”) (internal citations omitted); *State of Utah v. Germonto*, 868 P.2d 50, 59 (Utah 1993)(in a criminal context, information may be consolidated where the crimes were part of the same criminal episode, evidence of which may be the temporal proximity of the crimes.)

Remand on this issue is not required, however, because CPG's argument was largely based upon undisputed facts. According to Westgate, all that was required to learn of the alleged nondisclosure was to notice that an attorney named Burbidge was listed on Christensen & Jensen's letterhead. (R. 6049.) This was, by definition, something that Westgate could have observed at any time over the prior six years.

As one federal court judge has observed, when information about an arbitrator "could have been ascertained by more thorough inquiry or investigation, a post-award challenge suggests that nondisclosure is being raised merely as a tactical response to having lost the arbitration or an inappropriate attempt to seek a second bite at the apple because of dissatisfaction with the outcome." *Hobet Mining, Inc. v. International Union, United Mine Workers of America*, 877 F. Supp. 1011, 1019 (S.D.W.Va. 1994) (internal citations omitted).

In a similar context, but involving the disqualification of a judge, this Court has stated:

A party who has a reasonable basis for moving to disqualify a judge may not delay in the hope of first obtaining a favorable ruling and then complaint only if the result is unfavorable. Not only is such a tactic unfair, but it may evidence a belief that the judge is not in fact biased. Furthermore, delay imposes unnecessary disruption on both the judicial system and litigants. A disqualification proceeding is a collaterally attack on the substantive action, it disrupts orderly litigation, and it necessarily results in significant additional costs to the parties. Accordingly, a party must move with dispatch once a basis for disqualification is discovered.

Madsen v. Prudential Fed. Sav. & Loan Ass'n, 767 P.2d 538, 544 (Utah 1988).¹⁰

George Burbidge's name has been on Christensen & Jensen's firm header throughout C & J's representation of CPG, which began in 2004. *See* R. 5933 (select copies of correspondence from C & J to Westgate's counsel, Richard Epstein.) Indeed, it is undisputed that the very letter in which CPG appointed Arbitrator Burbidge was on that same letterhead, that Burbidge's name was prominently at the top of the letterhead, and that the letter was directed to Westgate's lead counsel. *See Exh. 3* hereto. In the court below, Westgate offered no explanation for the timing of its letterhead review.

CPG further argued that a previous last-minute "discovery" by Westgate should be considered. Almost four years into the District Court litigation – and shortly before trial – Westgate said it had suddenly noticed that the Utah Pattern of Unlawful Activity Act contains an arbitration provision. Westgate said that none of its attorneys had ever noticed the statutory provision before, even though it is contained in the UPUAA's key remedies section, and Westgate had cited other provisions of the UPUAA in the litigation. (R. 3062.) Westgate used this alleged last-minute discovery to file a motion to compel arbitration and seek a stay of the trial. (R. 4708.)

Such eleventh-hour (or, in this case, thirteenth-hour) discoveries are antithetical to the state trial court's goal that the arbitration be "handled as expeditiously as reasonably

¹⁰ Although the threshold for seeking recusal of a judge does not apply in arbitration, analogy to U.R.Civ.P. 63 is informative. Under Rule 63, a party waives any right to seek recusal unless the motion is brought within 20 days of when "the moving party learns *or with the exercise of reasonable diligence should have learned* of the grounds upon which the motion is based." (Emphasis added.)

possible.” *Arbitration Panel’s Pre-Arbitration Order and Hearing Notice*, p. 2. *See also, DeVore v. IHC*, 884 P.2d 1246, 1251 (Utah 1994) (“the policy of our law favors arbitration as a speedy and inexpensive method of adjudicating disputes.”)

By Westgate’s own admission, the only information needed to discover the familial relationship was and had been available to Westgate from the beginning of the arbitration. Westgate’s delay, along with the severe resulting prejudice, supports a finding of waiver as an alternative reason to reverse as, like the Second Circuit, this Court cannot “intend that unsuccessful parties to arbitration may have awards set aside by seeking out and finding tenuous relationships between [an] arbitrator and the successful party.” *Morelite Construction Corp. v. NY City District Council Carpenters Benefit Fund*, 748 F.2d 79, 85 (2nd Cir. 1984)(cited approvingly by this Court in *DeVore*.)

REQUEST FOR ATTORNEY FEES AND LITIGATION EXPENSES ON APPEAL

As urged above, CPG is entitled to an order reversing the trial court’s order of vacatur as manifest error. If CPG prevails in this appeal, it is entitled to “reasonable attorney fees and other reasonable expenses of litigation” pursuant to Utah Code Ann. § 78B-11-126 (fees and expenses recoverable by prevailing party in contested judicial proceeding under Section 78B-11-123 (confirmation) or 78B-11-124 (vacatur).)


CONCLUSION

For the foregoing reasons, this Court should reverse the trial court’s legal ruling that a first cousin relationship with an attorney not directly involved in the arbitration,

without more, triggered a duty to disclose on the part of the arbitrator and provided a basis for vacating the award.

DATED this 18th day of May, 2011.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read "Karra J. Porter", written over a horizontal line.

L. Rich Humpherys

Karra J. Porter

Scot A. Boyd

Alain C. Balmano

Defendants/Appellants

CERTIFICATE OF SERVICE

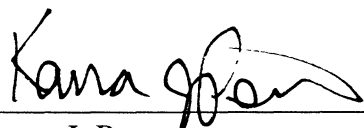
I hereby certify that two copies of **BRIEF OF APPELLANT** were mailed to the following this 18th day of May, 2011:

Michael D. Zimmerman
Troy L. Booher
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*Attorneys for Plaintiff/Counterdefendant
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Shaun S. Adel
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Defendant



Karra J. Porter

ADDENDUM

1. Trial Court's Ruling (09/30/2010) and Order (12/13/2010)
2. Transcript of Oral Arguments before Judge Davis (08/04/2010)
3. Letter on Christensen & Jensen Letterhead to Westgate Resorts Ltd.'s Counsel (11/26/2008)

Exhibit 1

**Trial Court's Ruling (09/30/2010)
and Order (12/13/2010)**

FILED
SEP 30 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH**

WESTGATE RESORTS, LTD,	RULING
Plaintiff,	Date: September 30, 2010
vs.	Case No.: 020404068
SHAUN S. ADEL and CONSUMER PROTECTION GROUP, LLC,	Judge: Lynn W. Davis
Defendants.	

I. Procedural Posture

This matter comes before the Court on two outstanding motions: Consumer Protection Group's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(B) Certification of Judgment as Final, and Westgate Resorts' Opposition to Consumer Protection Group's Combined Motion and Westgate Resorts' Motion to Vacate Arbitration Award.

II. Arguments of the Parties

a. Consumer Protection Group's Arguments in Support of Combined Motion

Consumer Protection Group ("CPG") states that a highly qualified arbitration panel issued an award of \$65,500 in favor of CPG and against Westgate Resorts ("Westgate"). The Utah Arbitration Act requires the district court to issue an order confirming the arbitration award

unless the award is modified or corrected pursuant to statute. *See* Utah Code Ann. § 78B-11-123. CPG argues that based on this, the arbitration award should be confirmed.

Further, CPG argues entitlement to attorney fees and costs associated with the arbitration and Utah Pattern of Unlawful Activity Act (“UPUAA”) claims. CPG seeks attorney fees on two independent grounds. First, the UPUAA entitles a prevailing plaintiff to recover reasonable attorney fees and expenses. *Id.* § 76-10-1605(2). Second, the Utah Arbitration Act provides that a “court may allow reasonable costs of the motion [to confirm] and subsequent judicial proceedings.” *Id.* § 78B-11-126(2); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 953 (Utah 1996). In the instant case, Westgate refused to voluntarily pay the arbitration award, forcing CPG to file this motion to confirm.

Finally, CPG requests the arbitration judgment to be certified as a final order under Rule 54(B), as there is no just reason for delay and there is no overlap in this judgment and any other remaining issues in the case.

b. Westgate’s Arguments in Opposition to Combined Motion and in Support of Motion to Vacate Arbitration Award

Westgate avers that the arbitrator chosen by CPG, Richard D. Burbidge, is a first cousin to CPG attorney George W. Burbidge II. Based on this fact alone, as supported by abundant law, this Court should deny CPG’s Motion to Confirm Arbitration Award and grant Westgate’s Motion to Vacate Arbitration Award.

Westgate argues that the statute which requires the Court to confirm an arbitration award has a key exception; the Court has a duty to confirm unless “the award is vacated pursuant to Section 78B-11-124.” Utah Code Ann. § 78B-11-123. The exception statute states that the Court shall vacate an arbitration award if there was evident partiality by an arbitrator appointed as a neutral arbitrator, corruption or misconduct by an arbitrator.

Required disclosures, found in Utah Code 78B-11-113, include an existing or past relationship between any arbitrator and any counsel or representatives of a party to the arbitration. The statute imposes a duty to disclose to all parties and to other arbitrators any facts “which a reasonable person would consider likely to affect the impartiality of the arbitrator.” *Id.* § 78B-11-113(2). The Code of Ethics for Arbitrators in Commercial Disputes requires arbitrators to disclose facts regarding any personal relationship which might affect impartiality or independence in the eyes of any of the parties. Further, any doubt should be resolved in favor of disclosure.

Westgate asserts that there was no such disclosure. In this case, the arbitrators had the power to award \$1.2 million in attorney fees to CPG. George Burbidge's direct financial interest in the outcome of the case, left in the hands of the first cousin Richard Burbidge, is surely a reason to doubt the validity of any such award. Westgate should have been informed of this decision so Westgate could choose to demand disqualification from the Panel. Further, the lack of disclosure to the other arbitrators surely poisoned the well, calling into question any decision of the Panel.

Westgate further argues that it does not matter that Arbitrator Burbidge was selected by CPG. There was still a duty to disclose. CPG cannot argue that Westgate knew that Arbitrator Burbidge was not neutral because the Panel prepared a fee agreement in which the arbitrators designated themselves as neutral arbitrators. The arbitrators were bound by the Code of Ethics, and thus bound by duty to disclose any potential conflicts or reasons for impartiality, such as a familial relationship with a party or its counsel.

Under section 78B-11-113(4) an arbitrator's failure to disclose a fact such as an existing or past relationship with a party's counsel, is grounds for vacating under 78B-11-124(b). Failure to disclose constitutes "evident partiality." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968).

The Utah Ethics Advisory Committee has opined that the participation of a cousin may result in judicial disqualification. Further, if the judge's impartiality might reasonably be questioned, the judge should either recuse or disclose the relationship to the parties to allow them to decide whether recusal is warranted.

c. CPG's Arguments Against Westgate's Motion to Vacate Arbitration Award

CPG argues that Westgate has waived any rights to seek recusal. First, the timing of Westgate's Motion to Vacate, given its history in this litigation, is suspect. Losing parties in an arbitration should not get a second bite at the apple when the facts show that the losing party should have discovered their basis for disqualification or recusal before the arbitration.

CPG asks the Court to look at the timing of the motion to vacate, which is clear evidence of Westgate's motive. Further, Westgate has a history of making prior late discoveries, costing the parties great expense and time.

Moreover, CPG argues that Arbitrator Burbidge was not technically neutral under the Utah Arbitration Act. However, the arbitrators did consider themselves neutral after their appointment and conducted themselves accordingly.

Party-selected arbitrators are clearly not the same as arbitrator-appointed arbitrators. Courts have recognized the differences between them. For example, it is reasonable that party-selected arbitrators might have some subjectiveness and they are not expected to adhere to the same standard of neutrality as a judge. In fact, even if a party-selected arbitrator had a substantial relationship with a party or attorney, the law states that the arbitrator “may not serve as an arbitrator **required by an agreement to be neutral.**” *Id.* § 78B-11-112(2) (emphasis added). CPG points out that there was no such neutrality agreement; it was added by the arbitrators themselves after they commenced the arbitration.

Even if all the arbitrators had been neutral, CPG argues that Westgate did not even come close to making a prima facie case for disqualification. The Utah Supreme Court ruled that to vacate an arbitration award, “the evidence of partiality must be certain and direct, not remote, uncertain, or speculative.” *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1256 (Utah 1994). CPG argues that Westgate’s motion is full of speculation. The only fact alleged is that the Burbidges are first cousin. Every other “fact” drawn from that is mere hypothesis and conjecture.

Further, CPG contends that Westgate misquoted a Utah Ethics Advisory Committee opinion regarding whether a judge who is a cousin to one of the parties should recuse. The full quote shows that the cousin relationship is relevant only “if a close personal relationship exists.” Utah Ethics Advisory Committee, Informal Opinion 89-5.

George Burbidge II and Richard Burbidge do not have a close personal relationship. Richard is one of 22 first cousins of George. They are nearly 20 years apart in age. They do not speak regularly, have no active social relationship, no business or personal connection, and in fact have not spoken in many months. Indeed, the Burbidges have been adverse to each other in litigation before. A mere genetic relationship does not constitute a substantial relationship requiring disclosure or recusal.

CPG argues that Westgate has provided no evidence supporting claims of corruption, fraud, undue means, or evident partiality. Arbitrator Burbidge has no interest in the outcome of the arbitration, and no existing substantial relationship with any party. Because no evidence to support any of the statutory or judicially created grounds exists, a motion to vacate an award must be denied. *Buzas Baseball Inc. v Salt Lake Trappers*, 925 P.2d at 951.

Moreover, federal decisions do not support Westgate’s argument. CPG cites several federal cases to show that the standard to vacate an arbitration award is a heavy, onerous burden, and that the mere existence of a genetic relationship or the mere fact of a prior relationship is not sufficient to cast doubt on the arbitrator’s impartiality. If a reasonable person objectively viewing all the facts would fairly entertain doubts about impartiality, then the arbitrator would be subject to disqualification. CPG alleges that once all the facts are known about the relationship between the two Burbidges, no reasonable person could have doubts about Arbitrator Burbidge’s

impartiality. Also, general guidelines from the American Arbitration Association and found in the Uniform Arbitration Act do not support vacating this award under these circumstances.

Finally, CPG asserts that Westgate's motion is brought in bad faith. Westgate did not file a certificate that the motion was filed in good faith, which would have been required in a motion to disqualify a judge under Utah Rule of Civil Procedure 63. Westgate's long history of attacking CPG and delaying the judicial process continues with the motion to vacate. Without supporting evidence, Westgate accuses Arbitrator Burbidge and CPG of impropriety and bias. These accusations should not be tolerated.

Based on the foregoing, CPG seeks confirmation of the arbitration award and denial of Westgate's Motion to Vacate Arbitration Award.

d. Westgate's Reply Arguments to CPG's Opposition to Westgate's Motion to Vacate

In reply, Westgate argues that it never waived the right to move to vacate based on Arbitrator Burbidge's failure to make a statutorily required disclosure. The burden was not on Westgate to discover an improper link between arbitrator and attorney; the burden was on the parties so linked to disclose. See Utah Code Ann. § 78B-11-113.

Further, the concealment of the relationship calls into question the impartiality of the arbitrator. Thus, both the relationship and the concealment of the relationship create doubts as to the validity of the outcome of the arbitration. Also, CPG's citation of Rule 63 and its 20-day deadline is not applicable in this case as the rule applies only to judges.

The emails show that Westgate brought this issue to the attention of the parties as soon as it noticed the similarity in names. After confirmation that the Burbidges were first cousins, Westgate immediately sent a letter to the Panel raising the issue. There was no bad-faith delay by Westgate. The bad faith is by CPG, who failed to make required disclosures, and Arbitrator Burbidge, who is statutorily required by Subsection 78B-11-113(1) to disclose *before accepting appointment*.

Moreover, Westgate argues that CPG's contention that Burbidge was not neutral simply confirms the doubts as to his impartiality. It also goes against the Arbitration Fee Agreement, which stated that "[t]he panel members each consider themselves as neutral arbitrators." Also, because Burbidge told the parties he was neutral, then any argument that there was no duty to disclose the relationship is wrong. Westgate had every reason and right to believe that the Panel was composed of neutral arbitrators, based on the parties' agreement, on statutory law, and on the representation of the Panel.

Westgate reiterates that according to Utah statute, an arbitrator who does not disclose a relationship with counsel “is presumed to act with evident partiality.” *Id.* § 78B-11-113(5). Thus, Westgate did not have to produce evidence of partiality because the failure to disclose gives rise to a presumption of partiality. The Panel itself expressly adopted the AAA Code of Ethics, which requires all arbitrators, whether neutral or not, to disclose any facts which might affect their neutrality, independence and partiality. A familial relationship is obviously one which falls within the type of information that might reasonably affect impartiality and should be disclosed. *See Burlington Northern Railroad Corp v. TUCO, Inc.*, 960 S.W.2d 629, 637 (Tex. 1997). Westgate also argues that CPG’s cited cases do not support its contention.

Finally, Westgate contends that CPG has engaged in distortion, deceit, and misrepresentation.

Based on the foregoing, Westgate requests this Court to vacate the arbitration award.

III. Ruling

The Court reluctantly grants Westgate’s Motion to Vacate Arbitration Award and denies CPG’s Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(B) Certification of Judgment as Final. The Utah Uniform Arbitration Act provides:

(1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

...

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

...

(4) If the arbitrator did not disclose a fact as required by Subsection (1) or (2), upon timely objection by a party, the court under

Subsection 78B-11-124(1)(b) may vacate an award.

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b).

Utah Code Ann. § 78B-11-113. Additionally, “[a]n individual who has . . . a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral,” under § 78B-11-112(2).

When an arbitrator fails to disclose or otherwise violates the rights of a party to the proceeding, § 78B-11-124 provides:

(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

...

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator; [or]

...

(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.

Such motion must be filed within 90 days. *See Id.* If the Court grants that motion, then the Court is not required to issue an order confirming the award. *See Id.* § 78B-11-123.

The question at issue is whether Richard D. Burbidge should have disclosed his relationship to counsel. A first cousin relationship is a fact that an arbitrator would be required to disclose because a reasonable person would consider this fact likely to affect the impartiality of

the arbitrator. In the present case, the arbitrator Richard D. Burbidge did not disclose his relationship to counsel as he was required to do by statute.

CPG asserts the relationship is not particularly close and that this omission does not meet the standard to vacate the award because “the evidence of partiality must be certain and direct, not remote, uncertain, or speculative.” *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1256. But the standard is not proof-of-actual-bias; this standard would be neigh impossible to meet. *Id.* The “certain and direct, not remote, uncertain, or speculative” evidence must be evidence of facts that “a reasonable person would consider likely to affect the impartiality of the arbitrator.” Utah Code Ann. §78B-11-113. The first cousin relationship is an uncontroverted fact.

The quality of the Burbidges’ relationship does not change Arbitrator Burbidge’s duty to disclose. Though CPG argues a judge in a similar situation need not recuse, the Supreme Court of the United States has ruled, “[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that the arbitrators disclose to the parties any dealings that might create an impression of possible bias.” *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968).

Additionally, the arbitrators were all designated as neutral in the fee agreement. Even if this was done *sua sponte*, the designation that they were neutral is in a formal agreement with the parties. Under Utah Code § 78B-11-112(2), Arbitrator Burbidge, in the absence of disclosure, should not have served at all, and under § 78B-11-113(5) his service creates a presumption of partiality.


His failure to disclose the relationship as required by § 78B-11-113(1)(b) violated the rights of Westgate to know the facts Arbitrator Burbidge was required to reveal, and he is presumed partial under § 78B-11-113(5). CPG’s argument that Westgate’s motion should be denied for timeliness fails. The statute sets the time limit at 90 days. The award was entered February 2, 2010. Westgate filed its motion April 8, 2010. Westgate’s motion was timely. Therefore, this Court vacates the arbitration award according to §§ 78B-11-124(1)(b)(i) and (iii).


Westgate’s Motion to Vacate Arbitration Award is granted.

CPG’s Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(b) Certification of Judgement as Final is denied.

The Court instructs counsel for Westgate to prepare an order consistent with this opinion.

Dated this 30th day of September, 2010.


Judge Lynn W. Davis
Fourth Judicial District Court



A certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020404068 by the method and on the date specified.

MAIL: RICHARD W EPSTEIN 100 West Cypress Creek Road Suite 700 Ft Lauderdale, FL 33309

MAIL: L RICH HUMPHERYS CHRISTENSEN & JENSEN PC 15 W SOUTH TEMPLE STE 800 SALT LAKE CITY UT 84101

MAIL: TODD M SHAUGHNESSY GATEWAY TOWER W 15 W S TEMPLE STE 1200 SALT LAKE CITY UT 84101

Date: 9/30/10


Deputy Court Clerk

Richard W. Epstein, Esq. (admitted *pro hac vice*)
Rebecca F. Bratter, Esq. (admitted *pro hac vice*)
GREENSPOON MARDER, P.A.
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Attorneys for Westgate Resorts, Ltd.

FILED

DEC 13 2010

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants.

ORDER ON CONSUMER PROTECTION
GROUP, LLC'S COMBINED MOTION
TO CONFIRM ARBITRATION AWARD
AND FOR ATTORNEY FEES AND
EXPENSES AND FOR RULE 54(B)
CERTIFICATION OF JUDGMENT AS
FINAL, AND WESTGATE RESORTS
LTD.'S MOTION TO VACATE
ARBITRATION AWARD

Case No.: 020404068

Division No. 8

Judge: Lynn W. Davis

Pursuant to this Court's Ruling dated September 30, 2010, attached hereto as Exhibit "A"
and incorporated herein by reference, it is hereby ORDERED, ADJUDGED AND DECREED
that:

1. Westgate Resorts, Ltd.'s Motion to Vacate Arbitration Award is GRANTED;

2. The Findings of Fact, Conclusions of Law and Arbitration Award dated February 2, 2010 issued in the arbitration proceedings styled: *Consumer Protection Group, LLC v. Westgate Resorts, Ltd.*, is VACATED, RENDERED NULL AND VOID and OF NO FORCE AND EFFECT; and

3. Consumer Protection Group, LLC's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(b) Certification of Judgment as Final is DENIED.

DATED this 13 ^{December} day of ~~October~~, 2010.

BY THE COURT:


Judge Lynn W. Davis
Fourth District Court

Approved As To Form:

CHRISTENSEN & JENSEN, P.C.

BY:


L. Rich Humphreys

Exhibit 2

**Transcript of Oral Argument
before Judge Davis (08/04/2010)**

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

WESTGATE RESORTS, LTD,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 020404068
)	
SHAUL S. ADEL and CPG,)	
)	
Defendant.)	

Oral Argument Hearing
Electronically Recorded on
August 4, 2010

BEFORE: THE HONORABLE LYNN W. DAVIS
Fourth District Court Judge

APPEARANCES

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For the Defendant: L. Rick Humphreys
Karra J. Porter
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Transcribed by: Wendy Haws, CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

P R O C E E D I N G S

(Electronically recorded on August 4, 2010)

THE COURT: You may be seated. Let's go on the record in the case of Westgate Resorts vs. Shaun Adel and CPG. This is 020404068. Record will reflect that Richard Epstein is here, as it relates to Westgate Resorts. Rich Humphreys, Karra Porter here representing the defendants.

Counsel, let's see, I only brought one file before me. It's file 19 in this case. So it's -- there's a bit of history, as we all are aware, in this case. We've had -- today we've had somewhere between 80 and 85 felony cases, some civil cases. The criminal cases range everything from a first-degree murder case to a variety of other -- other matters. If I don't seem real sharp in responding to your questions, there is a reason for that.

Let me -- let me state on the record what I believe is the procedural posture as it relates to the matters before the Court, and then a briefing as it relates to the substantive arguments on both sides. Then I have a couple of questions that will give you some guidance, and then we can proceed.

The matter comes before the Court on two outstanding motions; CPG's combined motion to confirm arbitration award and for attorney's fees and expenses, and for a Rule 54(b) certification of judgment is final, as Westgate's opposition to CPG's combined motion, and Westgate's motion to vacate the

1 arbitration award.

2 The arguments of the parties -- the briefing is very
3 extensive, and I think fairly thorough; but to consolidate the
4 arguments, I think they can be presented as follows. CPG's
5 arguments in support of the combined motion are as follows.
6 We have CPG states that a highly qualified arbitration panel
7 issued an award of 60,000 -- \$65,500 in favor of CPG and
8 against Westgate.

9 The Utah Arbitration Act requires a District Court to
10 issue an order confirming arbitration award, unless the award
11 is modified or corrected pursuant to statute. They rely upon
12 Utah Code Annotated 78(b)-11-123.

13 CPG argues that based on this, the arbitration award
14 should be confirmed. Further, CPG argues entitlement to
15 attorney's fees and costs associated with the arbitration and
16 Utah Pattern of Unlawful Activity Act, the UPUAA claims.

17 CPG seeks attorney's fees on two independent grounds.
18 First, the UPUAA entitles a prevailing plaintiff to recover
19 reasonable attorney's fees and expenses. That's under 76-10-
20 1605(2). Second, the Utah Arbitration Act provides that a,
21 quote, "A Court may allow reasonable costs of the motion to
22 confirm in subsequent judicial proceedings, based upon Buzz's
23 Baseball, Inc. vs. Salt Lake Trappers."

24 In the instant case, Westgate refused to voluntarily
25 pay the arbitration award, forcing CPG to file this motion for

1 confirmation. Finally, CPG requests the arbitration judgment
2 be certified as a final order under Rule 54(b). There is no
3 just reason for delay, and there's no overlap in this judgment,
4 in any other remaining issues in the case.

5 Westgate's argument in opposition to the combined
6 motion and in support of its motion to vacate the arbitration
7 award are as follows. Westgate avers that the arbitrator
8 chosen by CPG, that Richard D. Burbidge, is a first cousin to
9 CPG attorney, George W. Burbidge, II. Based upon this fact
10 alone, it's supported by abundant law this Court should deny
11 CPG's motion to confirm arbitration award, and grant Westgate's
12 motion to vacate the arbitration award.

13 Westgate argues that the statute which requires the
14 Court to confirm an arbitration award has a key exception, if,
15 quote, the award is vacated pursuant to section 78(b)-11-124.
16 The exception statute states that the Court shall vacate an
17 arbitration award if there was evident partiality by an
18 arbitrator appointed as a neutral arbitrator, or corruption,
19 or misconduct by an arbitrator.

20 Required disclosures found in Utah Code 78(b)-11-113
21 include an existing or past relationship between any arbitrator
22 and any Counsel or representative of party to the arbitration.
23 The statute imposes a duty to disclose to all parties, and
24 to other arbitrators any facts, quote, "which a reasonable
25 person would consider likely to affect the impartiality of the

1 arbitrator."

2 The code of ethics for the arbitrators -- or for
3 arbitrators in commercial disputes requires arbitrators to
4 disclose facts regarding any personal relationship which might
5 affect impartiality or independence in the eyes of any parties.
6 Further, any doubt should be resolved in favor of disclosure.

7 Westgate asserts that there was no such disclosure.
8 In this case the arbitrators have the power to award 1.2
9 million in attorney's fees to CPG. George Burbidge's direct
10 financial interest in the outcome of the case left in the hands
11 of his first cousin, Richard Burbidge, surely a reason to doubt
12 the validity of any such award.

13 Westgate should have been informed of this decision
14 so Westgate could choose to demand disqualification from the
15 panel. Further, the lack of disclosure to the other arbitrators
16 surely poisoned the well, calling into question any decision
17 with the panel.

18 Westgate further argues that it does not matter that
19 arbitrator Burbidge was selected by CPG, there was still a
20 duty to disclose. CPG cannot argue that Westgate knew that
21 arbitrator Burgess -- Burbidge was not neutral, because the
22 panel prepared a fee agreement in which the arbitrators
23 designated themselves as neutral arbitrators.

24 The arbitrators were bound by the code of ethics,
25 and thus bound by duty to disclose any potential conflicts or

1 reasons for impartiality, such as a familial relationship with
2 a party or its Counsel.

3 Under Section 78(b)-11-113(4), an arbitrator's failure
4 to disclose a fact such as an existing or past relationship
5 with the party's Counsel is grounds for vacating under
6 78(b)-11-124(b). Failure to disclose constitutes evident
7 partiality. That's relied upon the holding in Commonwealth
8 Codings Corporation vs. Continental Casualty.

9 The Utah Ethics Advisory Committee has opined
10 that the participation of a cousin may result in judicial
11 disqualification. Further, if a Judge's impartiality might
12 reasonably be questioned, the Judge should either recuse or
13 disclose the relationship to the parties, to allow them to
14 decide whether recusal is warranted.

15 Now, CPG's arguments against Westgate's motion to
16 vacate the arbitration award are confined as follows: CPG
17 argues that Westgate has waived any rights to seek recusal.
18 First, the timing of Westgate's motion to vacate, given its
19 history in this litigation, is suspect.

20 Losing parties in an arbitration -- a losing party in
21 an arbitration should not get a second bite at the apple, and
22 the facts show that the losing party should have discovered the
23 basis for disqualification and recusal before the arbitration.

24 CPG asked the Court to look at the timing of the
25 motion to vacate, which is clear evidence of Westgate's motive.

1 Westgate has a history of making prior relayed discoveries,
2 costing the parties great expense and time. Moreover, CPG
3 argues that arbitrator Burbidge was not technically neutral
4 under the Utah Arbitration Act. However, the arbitrators
5 did consider themselves neutral after their appointment, and
6 conducted themselves accordingly.

7 Party selected arbitrators are clearly not the same as
8 arbitrator appointed arbitrators, or Court appointed. Courts
9 have recognized the differences between them. For example, it
10 is reasonable that party selected arbitrators might have some
11 subjectiveness. They're not expected to adhere to the same
12 standard of neutrality as a Judge.

13 In fact, even if a party selected arbitrator has
14 a substantial relationship with a party or attorney, the
15 law states that the arbitrator, quote, "may not serve as an
16 arbitrator required by an agreement of neutrality," or to be
17 neutral.

18 Now, CPG points out that there was no such neutrality
19 agreement. It was added by the arbitrators, themselves, after
20 they commenced the arbitration. Even if the arbitrators had
21 been neutral, CPG argues that Westgate did not even come close
22 to making a prima facie case for disqualification.

23 Utah Supreme Court ruled to vacate an arbitration
24 award, the evidence of partiality must be certain, direct, not
25 remote, uncertain or speculative. CPG argues that Westgate's

1 motion is full of speculation. The only fact alleged is that
2 Burbidges are first cousins. Every other fact drawn from that
3 is mere hypothesis and conjecture.

4 Further, CPG contends that Westgate misquoted a Utah
5 Ethics Advisory Committee opinion regarding whether a Judge
6 who is a cousin to one of the parties should recuse. The full
7 quote shows that the cousin relationship is relevant only,
8 quote, "if a close personal relationship exists." Utah Ethics
9 Advisory Committee and formal opinion 89-5.

10 George Burbidge, II and Richard Burbidge do not have a
11 close personal relationship. Richard is one of 22 first cousins
12 of George. They are nearly 20 years in age apart. They do
13 not speak regularly, have no active social relationship, no
14 business or personal connection, and in fact have not spoken
15 in many months. Indeed, the Burbidges have been adverse to
16 each other in litigation before. A mere genetic relationship
17 does not constitute a substantial relationship requiring
18 disclosure or recusal.

19 CPG argues that Westgate has provided no evidence
20 supporting the claims of corruption, fraud, undue means, or
21 evident partiality. Arbitrator Burbidge has no interest
22 in the outcome of the arbitration, no existing substantial
23 relationship with any party. Because no evidence to support
24 any of the statutory or judicially created grounds exist, a
25 motion to vacate an award must be denied.

1 Moreover, Federal decisions to support Westgate's
2 argument do not in fact support Westgate's argument. CPG
3 cites several Federal cases to show that the standard to vacate
4 an arbitration award is a heavy, onerous burden; and that the
5 mere existence of a genetic relationship or the mere fact of
6 prior relationship is not sufficient to cast doubt on the
7 arbitrator's impartiality.

8 A reasonable person objectively viewing all the facts
9 would fairly entertain doubts about impartiality. Then the
10 arbitrator would be subject to disqualification.

11 CPG alleges that once all the facts are known about the
12 relationship between the two Burbidges, no reasonable person
13 could have doubts about arbitrator Burbidge's impartiality.
14 Also, general guidelines from American Arbitration Association
15 found in the Uniform Arbitration Act do not support vacating
16 this award under these circumstances.

17 Finally, CPG asserts that Westgate's motion is brought
18 in bad faith. Westgate did not file a certificate that the
19 motion was filed in good faith, which would have been required
20 in a motion to disqualify a Judge under Utah Rule of Civil
21 Procedure 63.

22 Westgate's long history of attacking and delaying the
23 judicial process continues with a motion to vacate. Without
24 supporting evidence, Westgate accuses arbitrator Burbidge and
25 CPG of an impropriety and bias. These accusations should not

1 be tolerated Based on the foregoing, CPG seeks confirmation
2 of the award and denial of Westgate's motion to vacate the
3 arbitration award.

4 Lastly, in reply, Westgate argues that it never waived
5 the right to move to vacate based upon arbitrator Burbidge's
6 failure to make a statutory required disclosure. The burden
7 was not on Westgate to discover an improper link between an
8 arbitrator and an attorney. The burden was on the parties so
9 linked to disclose.

10 Further, the concealment of the relationship calls
11 into question the impartiality of the arbitrator Thus, both
12 the relationship and the concealment of the relationship create
13 doubts as to the validity of the outcome of the arbitration.
14 Also, CPG's citation of Rule 63 and its 20-day deadline is not
15 applicable in this case, as the rule applies only to Judges.

16 The emails attached as exhibits show that Westgate
17 brought this issue to the attention of the parties as soon as
18 it noticed the similarity in names. After confirmation that
19 the Burbidges were first cousins, Westgate immediately sent a
20 letter to the panel raising the issue.

21 There's no bad faith delay by Westgate. The bad
22 faith is by CPG, who failed to make required disclosures, and
23 arbitrator Burbidge, who was statutorily required by subsection
24 78(b)-11-113 to disclose before accepting appointment.

25 Moreover, Westgate argues that CPG's contention that

1 Burbidge was not neutral simply confirms the doubt -- doubts
2 as to his impartiality. Also goes against the arbitration fee
3 agreement, which states, quote, that the panel members each
4 consider themselves as "neutral arbitrators."

5 Also, because Burbidge told the parties he was
6 neutral, and any argument that there was no duty to disclose
7 the relationship is just absolutely wrong. Westgate had every
8 reason and right to believe that the panel was composed of
9 neutral arbitrators, based on the parties' agreement, on
10 statutory law, and the repres -- actual representations of
11 the panel.

12 Westgate reiterates that according to Utah statute, an
13 arbitrator who does not disclose a relationship with Counsel is
14 presumed to act with evident partiality. Thus, Westgate did
15 not have to produce evidence of partiality because of the
16 failure to disclose. The very act, or the very failure to
17 disclose gives rise to a presumption of partiality.

18 The panel, itself, expressly adopted the triple A code
19 of ethics, which requires all arbitrators, whether neutral or
20 not, to disclose any facts which might affect their neutrality,
21 independence and partiality. A familial relationship is
22 obviously one of those which follows within the type of
23 information that might reasonably affect impartiality, and
24 should be disclosed, based upon the Burlington Northern
25 Railroad Corporation vs. Tucco, Inc.

1 Finally, Westgate contends that CPG has engaged in
2 distortion, deceit, and misrepresentation. Based upon the
3 foregoing, Westgate requests this Court to vacate the
4 arbitration award.

5 Now, here are my questions for you. I don't know
6 whether the award of \$65,000 frankly is an award that favors
7 Westgate or favors CPG. I have no idea. If CPG was asking
8 for millions of dollars, and there was an award of \$65,000, it
9 would appear to the Court, then, that Westgate is in fact --
10 has prevailed at the arbitration hearing.

11 Next, the United States Supreme Court stated, "We
12 should, if anything, be even more scrupulous to safeguard the
13 impartiality of arbitrators than Judges." More so as it
14 relates to arbitrators than Judges. "Since the former have
15 completely free reign to decide the law, as well as the facts,
16 and are subject to appellate review, we can perceive no way
17 in which the effectiveness of the arbitration process will
18 be hampered by the simply requirement that the arbitrators
19 disclose to the parties any dealings that might create an
20 impression of possible bias."

21 Well, the issue is dealings, at least under that case
22 law. Not familial relationship, but dealings. Now, on the
23 one hand you have the CPG attorneys and relationship as it
24 relates to the arbitrator, though it's a very distant cousin
25 relationship. As pointed out, I think there is a disparity of

1 approximately 20 years. They are not close, and they have
2 actually been advocates on opposite sides in litigation.

3 Then next question I have is Burbidge is not a very
4 common name. Why didn't Westgate at least ask CPG about this
5 coincidence? One could argue that any reasonable opponent in
6 the litigation or arbitration would have wondered what the
7 relationship was, if any, between the Burbidges. It's not a
8 common name.

9 If -- you know, is there any affirmative duty as
10 it relates to Westgate? Does it constitute a -- is it a
11 significant enough uncommon name so that it may constitute
12 a waiver? Those are some of the concerns as it relate --
13 from the Court. May give some direction as it relates to
14 your arguments.

15 Then initially state on the record whether or not
16 the briefing is very extensive, whether or not this short
17 statement on the record appears to be accurate, or whether
18 I've overlooked case law, or overlooked statutory provisions,
19 or missed some of your claims. Let's proceed.

20 MR. EPSTEIN: Your Honor, I suspect I should probably
21 start, since the motion to confirm is really not in serious,
22 you know, question here. It really kind of hinges on the
23 motion to vacate.

24 THE COURT: Vacate.

25 MR. EPSTEIN: I think we've all conceded or recognize

1 that.

2 THE COURT: Sure.

3 MR. EPSTEIN: One small correction. In your recitation,
4 which, as usual, I think that the parties would both agree was
5 extremely thorough and precisely to the point, in the mot --
6 the confirmation of award is governed by 78(b)-11-123.

7 When the Court recited what the exceptions, if you
8 will, to the confirmation would be, it cited to a motion to
9 modify or a motion to correct. It just basically overlooked
10 that in the statute. The other exception is when the award was
11 vacated, pursuant to Section --

12 THE COURT: Sure, yeah.

13 MR. EPSTEIN: -- 78(b)-1-124.

14 THE COURT: Recognize --

15 MR. EPSTEIN: I think it was just a misstatement --

16 THE COURT: Yes.

17 MR. EPSTEIN: -- on the Court's part, but the record --
18 I'd just like that to be clear for the record.

19 THE COURT: Yes, sir. The vacation portion of that, or
20 additional supplementation in connection with the exception,
21 yes, sir.

22 MR. EPSTEIN: Let me start with an observation first;
23 and I think all of us on this side of the bench are certainly
24 guilty of this, and probably guilty of it in our everyday
25 conduct of our practice. That is that we too often think

1 like lawyers, as opposed to thinking like the parties to these
2 proceedings, whom we represent.

3 The issue here is not really what Westgate's lawyers
4 did or didn't do, or should or shouldn't have done. Just like
5 in reality as to some of the legal things, it's not what CPG's
6 lawyers did or did not do; except in this case it is a bit
7 different, because CPG's lawyers had personal knowledge of
8 the issue that came to the forefront at the very end of the
9 arbitration proceedings, and you know, we do fault them for
10 not disclosing that, but we think through the lens of a lawyer.

11 What prompted this issue is really what Westgate
12 thought or thinks or has a right to think, when it now all
13 of a sudden realizes, after having committed its time and
14 its efforts and its resources, albeit through its lawyers,
15 you know, to these three individuals, believing them to be
16 completely unconnected and disinterested in the outcome of the
17 case, and finds out that one of the arbitrators, unbeknownst to
18 Westgate, unbeknownst to the party in the case, was related by
19 a very close degree of (inaudible), first cousins, to a lawyer
20 within CPG's law firm.

21 That's the lens I think we all must look at this
22 What is the party to believe? What is -- that, I think, also
23 maybe -- I won't say recasts, but certainly refines what the
24 purpose of the disclosures are in the Utah Arbitration Code.
25 It's not to inform the lawyers about this or that. It's to

1 make sure the parties have the sense and the realization that
2 the process and the proceedings in which they are about to
3 embark are not going to be infected.

4 THE COURT: I agree with that, even in issues as it
5 relates to recusals, and when attorneys appear before me, and
6 I need to indicate as it relates to a relationship or whatever
7 it may be, or a past partnership 20 or 30 years ago.

8 It's not the attorneys that are the critical ones
9 that stand before me in connection with that ultimate judgment.
10 I allow Counsel then to visit with their parties, with their
11 clients, to ultimately make that determination relative to the
12 issue of recusal. So your point's well taken.

13 MR. EPSTEIN: Thank you, and just to conclude it,
14 Westgate, in its view, had the right to know this before it
15 engaged, you know, in these proceedings. If it, in fact --
16 you know, kind of leaped all the way to the end -- if, in fact,
17 it is demonstrative true that there is no relationship that one
18 would be concerned about between these two gentlemen, that's
19 something that should be sorted out beforehand, not after the
20 fact.

21 I mean, it kind of turns on its head the whole notion
22 of disclosure when you say, "But it wouldn't have mattered
23 anyway." I mean, that's not the point. The point is that the
24 disclosure gives the parties the opportunity to evaluate those
25 matters before they engage in the process, and so as to give

1 them the best opportunity possible to insure that the process
2 itself is not flawed. That's what we feel unfortunately
3 occurred here.

4 So let's kind of start very -- at the very fundamental
5 level here. As the Court is very aware, this arbitration is --
6 had somewhat unusual underpinnings. It is rare, you know, that
7 an arbitration proceeding is mandated or directed by statute.
8 It is much more commonplace that there be an agreement to
9 arbitrate. That is, in fact, the standard process.

10 We do not have that here. We demonstratively do
11 not have a pre-litigation agreement between the parties to
12 arbitrate their disputes. It doesn't exist; we all acknowledge
13 that. In fact, there are very few facts of that type with
14 which the parties disagree or dispute.

15 So what we're dealing with here is an unusual case;
16 one where sort of standard concepts and practices may not
17 operate in the traditional way that those of us, I'm sure
18 Richard and Karra, just like I am, we're very familiar with
19 the arbitration process. We deal with it quite a bit in our
20 normal day-to-day practice, and one that is predicated upon
21 a pre-litigation ar -- agreement to arbitrate is much more
22 simpler -- much more simple to implement. Typically it will
23 invoke a particular organization and its rules and procedures.

24 Here we did not have that. So basically the Court --
25 you, your Honor -- directed a procedure. So what we essentially

1 have here is an arbitration decreed, if you will, by law,
2 where the parties were to arbitrate, and you directed how the
3 arbitrators were to be selected, in a way that is, candidly,
4 pretty commonplace. That would be the traditional -- I won't
5 say traditional -- commonplace way for a three-member panel,
6 which would be typical in a complex case, to be constituted;
7 because otherwise, it's all going to end up back in your hands,
8 which is something, obviously, that the Court would like to
9 leave as much as possible to the parties.

10 Let the parties have, you know, the involvement and
11 control over the procedures. So again, nobody is criticizing
12 in any fashion that process. It was a particular -- it was a
13 particularly appropriate one under these circumstances.

14 Where it left wanting, if you will, that might have
15 been addressed if we had a pre-litigation agreement is some of
16 the other criteria that would be applicable to the selection
17 process.

18 For instance, although it's not really in the record,
19 but I think the Court can take judicial notice, the way the
20 triple A works is that they send you a roster, and you get
21 people that are supposedly qualified, and then you get to go
22 through a selection process much like selecting a jury. You
23 get to exercise peremptory challenges, and then you kind of
24 rank the rest of them the way you want. FINRA, the security
25 self-regulatory organization, uses a similar procedure.

1 Again, we didn't have that. So you don't have
2 a vetting process that already kind of pre-qualifies the
3 arbitrators. Each of the parties selected an arbitrator.
4 The two arbitrators selected the third, which explains, I
5 think, why the Hobart mining case, a case that both parties
6 cited pretty liberally, the Seventh District of West Virginia
7 case is really sort of applicable in a couple of ways, but
8 rather inapplicable in many other ways.

9 That case, first of all, is excluded from the Federal
10 Arbitration Act because it arises under a collective bargaining
11 agreement; but even to the extent that there's some analogous
12 aspects of the case that are appropriate to consider here,
13 there was a very extensive vetting process that occurred before
14 the arbitrator was selected. The parties jointly developed
15 questionnaires that were sent to various arbitrators, answered,
16 and then that information was evaluated.

17 That process didn't occur here. There was no vetting
18 at all. So it's one thing as CPG argues here to say that the
19 Hobart case, you know, says that, you know, once someone's been
20 appointed, you basically don't have the right, you know -- you
21 should have done the investigation yourself, or some such thing
22 as that.

23 In Hobart part of the process included an investigation
24 that the parties themselves controlled. The parties wrote the
25 questionnaires that the arbitrator candidates answered. So the

1 parties had the right to actually determine what they wanted to
2 know from each of the arbitrator candidates before making a
3 selection.

4 That is a huge distinguishing factor here. It's one
5 thing to say in Hobart that, you know, the late challenge to
6 the arbitrator, you know, is not, you know, legitimate and
7 shouldn't be honored, when there was already an opportunity
8 to fully investigate each of those arbitrator candidates before
9 the selection process actually occurred.

10 No such process existed here. What did exist here
11 is the Utah Arbitration Code, which has not investigative
12 procedures, but disclosure procedures. It puts the onus on
13 the arbitrator and anyone who might have knowledge about the
14 arbitrator, to make disclosures.

15 I think that's where part of CPG's argument is so
16 wrong, in answering your question, your Honor, and where --
17 the notion that Westgate had an obligation to inquire or
18 investigate is also so wrong. That simply has never been the
19 law under any of the cases that have been cited; and of course
20 the case law, as the Court has already noted, is extensive.

21 In the Commonwealth Codings case, which is the U.S.
22 Supreme Court case, there's no notion, either in Justice
23 Black's majority opinion or Justice White's concurring opinion,
24 that there's some duty on the part of a party to investigate.
25 None. Never considered. Never mentioned. Not even on the

1 horizon.

2 What is considered is an affirmative duty to disclose.
3 What the two Justices, although they were on the same side of
4 the majority opinion, disagreed about, is essentially what
5 would the impact of those disclosures be? You know, how much,
6 you know, weight is a particular disclosure going to be given
7 in the same disqualification process, which would be happening
8 at the inception of the arbitration, not at the end of the
9 arbitration, as this disclosure occurred here.

10 So starting with the U.S. Supreme Court, and all of
11 the case law authority that bears on this issue, every one of
12 those cases deals with disclosure, not investigation, except
13 Hobart, which is instructive in that the investigation was part
14 of the process, not like here. So it's really --

15 THE COURT: Sure, it's part of the vetting process.

16 MR. EPSTEIN: Yeah, I mean, and if we had had something
17 like that, then we wouldn't be able to stand here and say we
18 didn't know, because it would have been, then, our fault for
19 not asking the right question, which is exactly what the end
20 result in Hobart was, is that they pointed to the company
21 and said, "Look, I can't help it if you didn't ask the right
22 question." You asked a bunch of questions all around that
23 question, like you know, "Do you have --" you know, does the
24 arbitrator have any business with the International Union, but
25 you never asked, "Does any family member?" You just didn't ask

1 the right question.

2 That happens in life all the time; but it is the only
3 time in any of the jurisprudence we've looked at in briefing
4 this case, where there was any investigative responsibility on
5 the part of the party, as opposed to disclosure responsibility;
6 and it is so materially different that it is not the guidance
7 the Court should have here, other than to show the stark
8 contrast between what is every other case, and what is Hobart.

9 Hobart is totally distinguishable on that basis, you
10 know, and it has no bearing on the obligation on the part of
11 the arbitrator to disclose. In that instance the duty on the
12 -- any obligation, if you will, that they wanted to imply on
13 the arbitrator to disclose was extinguished because of the
14 inquiry that occurred prior to appointment.

15 Now, so I understand -- clearly we understand, you
16 know, the Court's thoughts, you know, on this -- on this whole
17 issue of whether there was some duty to inquire under these or
18 under any other circumstances. I mean, obviously you know what
19 our answer is. Our answer --

20 THE COURT: Sure.

21 MR. EPSTEIN: -- must be, "No;" but from a couple of
22 different standpoints. First of all, everyone except Karra's
23 wearing glasses here; and I will tell you, as I was reading
24 over last night and this morning, was reading over the filings
25 that CPG made in this, with the copies of some of samples of

1 letters that we had exchanged during that period of time, I
2 took off my glasses, I looked at it, and by gosh, I mean, you
3 know, the print is very small.

4 I don't want to use failing eyesight, or you know, the
5 mature -- the maturation process as an excuse; but please, it
6 kind of begs the question, "How frequently does somebody who
7 receives a letter on letterhead actually sit and study the
8 list of lawyers on the top of the letterhead? I mean, that
9 is surplusage to the reason why you look at a letter. You read
10 the letter.

11 You know, I think it's unreasonable to assume, and
12 it's unreasonable to create some sort of inquiry notice simply
13 because something might have been able to be discovered if you
14 went back three or four or five years off of a few pieces of
15 paper, or even the one piece of paper where Richard Burbidge
16 was first identified.

17 That's not at all consistent with the law. Even if
18 there was some basis for arguing that Westgate was on inquiry
19 notice, how does that dispense with the statutorily imposed
20 duties to disclose? Because again, as we've pointed out, the
21 statute that governs -- unquestionably governs this arbitration
22 process, the Utah Arbitration Code, in -- nowhere in its text
23 is there a duty on the part of a party to investigate or
24 inquire. The duties flow solely from the arbitrator to the
25 parties.

1 So even arguing that this might be one of those
2 situations where inquiry notice is appropriate, the law says
3 otherwise. As a practical matter, why would one look if one
4 has an expectation of disclosure?

5 Where the law has developed, where disclosure's only
6 one part of the overall picture, such as, for instance, in
7 securities laws, where there is side-by-side with the duty on
8 the one parts, and the issue or to make disclosures, there's
9 also some duty on the part of the purchaser of a security to
10 ask questions if facts are present that would give rise under
11 the law to a duty to make reasonable inquiry. What they call
12 -- I just drew a blank what it's called -- I mean, an inquiry
13 notice. It's called "inquiry notice."

14 Again, we don't have that here. Utah Courts have
15 never spoken in terms of inquiry notice in an arbitration
16 process where there's an affirmative duty of disclosure. No
17 Court has ever imposed such a requirement, absent, of course,
18 Hobart, which we've already talked about.

19 So, again, the question is certainly a legitimate
20 one, and I think an appropriate one from the standpoint of
21 evaluating whether the parties may be engaged in intentional
22 action; but none of it -- or malicious action; but none of
23 it dispels the real issue here. That is, that the duty to
24 provide affirmative disclosure is the only one that the law
25 here recognizes.

1 THE COURT: Okay, you've addressed my question as it
2 relates to duty, and have been responsive to that. You've been
3 responsive as it relates to the issue of -- I indicated in --
4 initially that it was a fairly distant relationship, et cetera,
5 no evidence of, you know, sort of collegiality in connection
6 with these type of cases or anything else; and you've been
7 responsive to that. The third question that I ask is, who
8 prevailed here? I have no idea.

9 MR. EPSTEIN: I -- well, I mean, obviously CPG won,
10 all right, which was not a given, at least in our -- they
11 received approximately 60 percent, thereabouts, of what
12 the demand would have been. The claim -- actually, as the
13 Court will remember, the assigned claims were all sort of
14 individual -- okay.

15 THE COURT: Sure.

16 MR. EPSTEIN: They were -- I may be one or two off. I
17 think there were 244 that went -- that were submitted in one
18 way or another, and the panel ordered a recovery on behalf of
19 131. So what is that? It's around 60 percent. So the number
20 was never a huge number. It was never going to be a huge
21 number. At the beginning of it, CPG waived the doubling of
22 damages component, and of course punitive damages are not
23 involved --

24 THE COURT: Okay.

25 MR. EPSTEIN: -- in that. So they -- you know, I guess

1 it was favorable to CPG in that they won, for sure. To the
2 extent that, you know, Westgate lost, it could have been a
3 little worse, but again, that would have -- it's really not a
4 consequential number.

5 It was liability that was hard fought here, not so
6 much the damages, as was sort of down here. CPG just limited
7 its damages to about 500 on a (inaudible) basis, to the \$500
8 fair value of the -- the travel certificate.

9 THE COURT: Sure.

10 MR. EPSTEIN: What the trip would have been worth, the
11 two round-trip air fares and a couple of nights at a hotel.

12 THE COURT: Okay.

13 MR. EPSTEIN: Okay, I would like to just add one thing,
14 I think, to the -- to the issue of evaluating the reality of
15 the relationship between Mistfers Burbidge.

16 THE COURT: Yeah, but I think you've already covered
17 that satisfactorily; that after the fact --

18 MR. EPSTEIN: Yeah, but that's really --

19 THE COURT: --the after the fact or post judgment types
20 of considerations is not the focus of the Court. The focus of
21 the parties is at the outset as it relates to the relationship,
22 so that they can evaluate prior to the arbitration, period.

23 MR. EPSTEIN: Exactly right, and that's what it is.
24 I would just, you know, point out that sort of supplementing
25 that, when you look at 78(b)-11-113, the Legislature has

1 expressed its own opinion of the importance of these pre-
2 appointment disclosures; because they went in and in subsection
3 (4) said, you know, "If the arbitrator did not disclose a fact,
4 as required by subsection (1) or (2)," which would be, you
5 know, the basic disclosures, "upon timely objection by a party,
6 the Court," under section 124, vacate, "may vacate the ward."

7 Then in (5) it goes on, "An arbitrator appointed as
8 a neutral arbitrator, who does not disclose a non-directive
9 material interest in the act of the arbitration, or knowingly
10 exists a substantial relationship with a party is presumed."

11 So the Legislature has gone one step further; and they
12 really expressed an important -- how important it is to have
13 that pre-appointment information and right to evaluate; and
14 that that right ought not to be simply cavalierly dispensed
15 with. They've made it so important that they're going to let
16 the people go all the way through the process, and end up being
17 exactly where we are here today.

18 That is expressly what the Legislature has articulated.
19 That is one instance, by the way, your Honor, where the Utah
20 Arbitration Code is materially different than the Federal
21 Arbitration Act and the Uniform Act, is that the Legislature
22 has expressed a much stronger opinion about, you know, the
23 disclosure of an interest by an arbitrator or a relationship
24 by an arbitrator than either the Uniform Act or the Federal Act
25 does.

1 I would also point out that the same statute, 11-113,
2 also requires that there be a continuing obligation. I know
3 the Court is going to hear, you know, from CPG that for a lot
4 of reasons they weren't neutrals, they weren't intended to be
5 neutrals.

6 Let me point out one thing that maybe I think we
7 didn't necessarily emphasize too much. One of the exhibits,
8 the CPG's opposition, is a letter that Mr. Humphreys wrote to
9 me, complaining and actually criticizing our provision to Judge
10 Billings of a stack of pleadings from your Honor's case.

11 Referring to it essentially as an improper ex parte
12 communication, which certainly, and I'll be the first to
13 acknowledge, would be -- would be a prudent and probably
14 proper observation --

15 THE COURT: Sure.

16 MR. EPSTEIN: -- if the arbitrators are neutrals, as
17 then I shouldn't have done that. We fixed it. We provided
18 the same documents to everybody else. I mean, it turned out
19 to be a non-issue, other than I think it is very telling, in
20 the absence of a written pre-litigation agreement, what the
21 parties or the lawyers, themselves, thought about this case.

22 I stand -- I stood corrected by Mr. Humphreys that we
23 were to deal with them as we would if it was the triple A or
24 some other jams, some other organization that had administered
25 in these things, you know, and they were neutrals.

1 Then, as the Court has already observed, in the fee
2 agreement that they prepared, which in our view now became, at
3 least in substantial part, the agreement to arbitrate between
4 the parties, they deem themselves neutral arbitrators; and in
5 the award, itself --

6 THE COURT: Yeah.

7 MR. EPSTEIN: -- not only they reaffirmed that they
8 were neutrals, but the arbitrators, themselves, expressly
9 clothed themselves under the code of arbitration ethics which
10 we've both cited to and which the Court has, you know, numerous
11 copies of attached to many of these submissions.

12 No party has ever objected to that, and certainly we
13 never would have. Certainly CPG is not. It seems to me that
14 their protestations about this now, if anything, come way too
15 little and way too late. The arbitrators, themselves, made the
16 decision for the parties, and if either party had any problem
17 with it, if it was in fact something that the parties did not
18 or were unwilling to agree to, the time to object to this was
19 way back when.

20 THE COURT: I understand that the language required
21 by an agreement to be neutral, the additional language that
22 was included; but by virtue of that, one might look at the
23 arbitrator Burbidge and say he fully, totally considered
24 everything, and considered that his work was absolutely
25 neutral in connection with this, and that there was no

1 substantial relationship or professional relationship that
2 would impair his neutrality in any form or fashion.

3 MR. EPSTEIN: Well, but he's not the one that makes
4 that decision. At the point of disclosure, the Code of
5 Arbitration Ethics allows the --

6 THE COURT: Sure.

7 MR. EPSTEIN: -- arbitrator to engage in that kind of
8 an analysis after disclosure has been made, and after a party
9 has raised a question about it.

10 THE COURT: Right. I understand that.

11 MR. EPSTEIN: Again, cart before the horse.

12 THE COURT: I understand that.

13 MR. EPSTEIN: He may very well have come to that
14 conclusion, and we may very well have honored it, or not;
15 but again, a party is going to look at this much differently
16 than we lawyers might, you know, and believe that Richard
17 Burbidge is, as I, you know, am sure he is. We've never
18 made an accusation that Mr. Burbidge did anything untoward
19 in connection with discharging his duties as an arbitrator,
20 other than failing to make these disclosures.

21 Again, as the Court pointed out in its synopsis of the
22 -- of CPG's position, we've never used the undue means or fraud
23 trigger under the -- under Section 125. We've never brought
24 that up. That's not part of it. The only one that we've
25 invoked is the evident partiality. That is only because in

1 Section 113 the presumption of evident partiality is created by
2 the failure to make that disclosure.

3 So we've never professed, and we agreed to this in the
4 reply, that we're making a factual showing that Mr. Burbidge
5 engaged in fraud or undue means or there was evident partiality
6 as a matter of objective evidence or proof. We've not pointed
7 to anything he said or did during the proceedings or anything
8 like that.

9 It's the presumption, which the statute does not say
10 is rebuttable. It's presumed. It doesn't speak in terms of
11 it ever being rebuttable, and no party has argued that it is.
12 We're saying it is, you know, an irrebuttable presumption of
13 evident partiality which mandates vacatur here under the
14 statute. So, you know, again, this is a process that we can
15 all bemoan could have been easily avoided.

16 THE COURT: Sure.

17 MR. EPSTEIN: I'm not sure why it wasn't; but I can't
18 believe that the law of the State of Utah, in light of the very
19 strict and stringent disclosure requirements that its statutes
20 require says that it's up to the now aggrieved party to have
21 discovered all this on its own.

22 That can't be the result-- a result that is consistent
23 with disclosure requirements of the Utah Arbitration Act, even
24 if we were to disregard the party's declaration of neutrality,
25 they were in fact neutral, or disregard the triple A Code of

1 Arbitration Ethics.

2 THE COURT: Well, did a -- by virtue of a strict
3 disclosure -- strict disclosure for requirements, would any
4 companion arbitrators have a -- also an arbitration as it
5 relates to that? Well, if they knew, they would have to --
6 I suspect they would let you know.

7 MR. EPSTEIN: I think it's fair to say if they knew,
8 they probably would have -- they should have spoken as well.

9 THE COURT: Okay, very well. Let's shift gears and go
10 back to Rich Humphreys or Karra Porter now.

11 MR. EPSTEIN: I think there's one other issue beyond
12 the arbitration. They requested attorney's fees in connection
13 with these proceedings.

14 THE COURT: Sure.

15 MR. EPSTEIN: It would be just these proceedings.

16 THE COURT: Well, if they prevailed, then they --

17 MR. EPSTEIN: Yeah.

18 THE COURT: -- let's go to that, because if they don't
19 prevail --

20 MR. EPSTEIN: But that's always --

21 THE COURT: -- of course it's moot; but if they do
22 prevail, then let's go to your arguments in connection on that.

23 MR. EPSTEIN: We really don't have one. I mean, under
24 the UPUAA, both those statutes I believe are discretionary; but
25 it's clear that under the arbitration code, if a motion to

1 vacate is brought and denied, you, in your discretion, have the
2 right to award fees. That's what it says.

3 THE COURT: Now, here's my last question for you as
4 it relates to this. What happens in terms -- if I grant your
5 motion, okay, to vacate, what does that do to the attorney's
6 fees that have been paid to the arbitration panel? I mean, do
7 you -- or real costs associated with that? Does it -- is there
8 an independent basis upon which you could make some claim in
9 connection with that, of a breach of the Utah Act?

10 MR. EPSTEIN: Your Honor, you happened to ask the
11 question that we've actually researched, because we have
12 another case where precisely that happened; but a Court made
13 a finding of evident partiality based upon the record. There
14 is no case law --

15 THE COURT: Okay.

16 MR. EPSTEIN: -- that provides any relief or remedy to
17 the agreeing person.

18 THE COURT: I'm just trying to figure out whether there
19 is independent relief or remedy, depending on the decision that
20 was made.

21 MR. EPSTEIN: There is not. We could find nothing that
22 would support an argument that the triple A --

23 THE COURT: Well, as usual, it's sort of the --

24 MR. EPSTEIN: -- should refund or --

25 THE COURT: -- case of first impression before the

1 Court.

2 MR. EPSTEIN: Yeah, but there was nothing to say it
3 shouldn't.

4 THE COURT: Okay.

5 MR. EPSTEIN: It's just that it hadn't been done.
6 What the statute says, though, is if you do vacate for evident
7 impartiality, you order a rehearing.

8 THE COURT: Sure.

9 MR. EPSTEIN: Okay, so it would, I mean, ostensibly
10 go back -- well, if it was a single member, the hearing would
11 be before a new arbitrator. Presumably it would probably be
12 before a new arbitration panel, because that would be the only
13 way that one could extinguish any, you know, any suspicion.

14 THE COURT: Uh-huh.

15 MR. EPSTEIN: You know --

16 THE COURT: Okay.

17 MR. EPSTEIN: -- on what might have occurred.

18 THE COURT: Very well. Mr. Humphreys, you need to
19 be -- remain right there, or you can come up to the podium,
20 whatever you feel most comfortable.

21 MR. HUMPHREYS: If it's all right, I'll stay right
22 here, since I have a number of things to juggle. Your Honor,
23 first of all I would like to indicate that CPG, in its present
24 motion, withdraws a Rule 54 certification.

25 THE COURT: Okay.

1 MR. HUMPHREYS: The reason why is because it was
2 anticipated when we first filed the motion to confirm that
3 all of the matters pending regarding the arbitration would be
4 resolved, and the matter could be certified.

5 We have yet to have the arbitrators make certain
6 decisions, and we think it -- and there's a pending issue
7 regarding attorney's fees. I will address that a little
8 later, but at the outset I would simply state it would be our
9 position that all of the as -- all aspects of attorney's fees
10 be addressed at another time, whether the motion is denied or
11 granted, because it is filled with its own issues and with its
12 own factual findings and basis.

13 THE COURT: Yes, sir.

14 MR. HUMPHREYS: So with that now, I turn to the motion
15 to vacate. What I would like to do is boil it down, if I
16 could, to what would be the best case, the best argument by C
17 -- or by Westgate. That is that there was a duty to disclose,
18 that it was a matter that should have been disclosed -- and
19 I'm giving these as assumptions, because I'm going to address
20 them later -- third, that the presumption was irrebuttable, and
21 therefore evidence regarding whether there was in fact any kind
22 of substantial or special relationship is irrelevant. That is
23 what has to be assumed in order for Westgate to have its best
24 case argument.

25 The reason I say they have to have the rebuttable

1 -- the presumption irrebuttable, and that evidence of the
2 substantial relationship is irrelevant, because they are
3 arguing that. They are arguing that the mere failure to
4 disclose is by itself a prima facie and irrebuttable,
5 unrefutable case to vacate. That's their best argument.

6 Now, I would like to suggest, your Honor, that the
7 argument that they make is not correct, either by statute or
8 by facts. Counsel was correct; the Legislature did envision
9 the need to disclose. In fact, in Section 113 -- well, at
10 78(b)-11-113 I'll just refer to the subsections from this
11 point forward.

12 In 113 it talks about disclosure by the arbitrators.
13 Now, your Honor, I have a copy of this section of the code,
14 which is critical. I'd be happy to give it to you, unless you
15 have a copy.

16 THE COURT: I don't have one before me, Counsel.

17 MR. HUMPHREYS: May I give you a copy?

18 THE COURT: Yes, sir.

19 MR. HUMPHREYS: Thank you.

20 THE COURT: As long as you give one to opposing
21 Counsel.

22 MR. HUMPHREYS: I've done that. This is a remnant from
23 a trip to Alaska last week.

24 THE COURT: Oh.

25 MR. HUMPHREYS: It will be off next week. All right,

1 now let's turn to the disclosure, because there's a suggestion
2 that this duty to disclose is end all of all discussion and
3 argument; but that is not the case.

4 First of all, the disclosure and the duty to disclose
5 is very carefully pointed out in No. 1, which is that there
6 must be a disclosure of any known facts that a reasonable
7 person would consider likely to affect impartiality of the
8 arbitrator.

9 All we have is evidence of first cousin relationship.
10 That's it. On its face, alone, we do not meet that requirement
11 of likely affecting impartiality. Possibility? Yes, but not
12 likely. Therefore there's a question on its face whether there
13 is even a duty; but for purposes of this argument right now,
14 I'm going to assume there was a duty to do that.

15 Is that the end, and is there a basis on that alone to
16 vacate the award? I would suggest to the Court that is not the
17 case. The reason why is that the right to vacate an award is
18 very particularly spelled out, and it has to be statutory.

19 So turn, if you would, to subsection (4) of this
20 Section 113. This is how the Legislature dealt with non-
21 disclosure. It's not saying that non-disclosure is an end
22 all, and it must be vacated. On the contrary, it says, "If
23 the arbitrator --"

24 THE COURT: Sure.

25 MR. HUMPHREYS: -- "did not disclose a fact as required

1 by subsection (1) or (2) -- we just read No. 1 -- upon timely
2 objection by a party, the Court, under subsection 124(1)(b) --

3 THE COURT: May.

4 MR. HUMPHREYS: -- may vacate. So now we have to
5 understand why the issue is "may" instead of "shall," because
6 if, again, what they -- what Westgate is arguing is true, that
7 there is a non-disclosure, there was a duty to disclose, it
8 was material, and there is a presumption that's irrebuttable,
9 therefore why do we have a "may vacate"? There is no reason
10 for that; and that's why their argument fails.

11 So now we have to get to what, then, does the
12 Legislature give by way of guidance in terms of having the
13 Court consider whether it may vacate. That is found in the
14 following paragraph No. 5, subparagraph (5), an arbitrator
15 appointed as a neutral, and I'll get to that in a minute.

16 I'll assume for now that Mr. Burbidge is a neutral
17 arbitrator. An arbitrator appointed as a neutral arbitrator
18 who does not disclose a known, direct or material interest
19 in the outcome of the arbitration, or a known, existing and
20 substantial relationship with a party is presumed to act with
21 evident partiality, and that it refers to 124(1)(b), which is
22 the basis of their motion to vacate.

23 Here there is a presumption. It is very clear law in
24 Utah that a presumption is always rebuttable unless stated
25 otherwise. Court's often refer to it as a balloon. That

1 the balloon is the presumption, and as soon as evidence is
2 presented contrary to the presumption, the balloon pops.

3 We only have now Westgate relying on a presumption.
4 CPG has submitted an affidavit by George Burbidge, the supposed
5 conflict and relationship, that clearly points out, as the
6 Court has outlined in his initial summary of the arguments,
7 that there was no relationship that would have affected the
8 impartiality of arbitrator Burbidge.

9 Therefore, we have a presumption and only a presumption
10 that Mr. Epstein has agreed in the last few minutes that that's
11 all he has, is the presumption; and he's relying only upon
12 that, that it is irrebuttable, and that has to be grounds.

13 Now, if you turn to 124, which is now the basis of a
14 vacation of award, which is on the following page that I gave
15 you, there he says it's under (b)(1). "The Court shall vacate
16 the award made in the arbitration if there was one evident
17 partiality." Not a presumption, but evident partiality by
18 the arbitrator appointed as the neutral.

19 Again, for purposes of argument, we are assuming
20 Mr. Burbidge was neutral. Corruption or misconduct, we don't
21 have the other three; and Mr. Epstein has conceded that it's
22 evident partiality that is --

23 THE COURT: Comes into play, sure. It's not corruption
24 or -- yeah.

25 MR. HUMPHREYS: Yes. Okay, so all we're dealing

1 with is evident partiality. This doesn't talk in terms of
2 presumption; it talks only in terms of a finding by the Court
3 of evident partiality.

4 Before the Court, since Westgate has presented no
5 evidence, is not alleging any evidence, yet now there is
6 evidence before the Court in the form of an affidavit by
7 George Burbidge that there is no basis to support the motion
8 to vacate under Section 124. Now, for these reasons, your
9 Honor, given their best argument, it fails; and therefore
10 there cannot be a vacation of the award.

11 Now, what I would like to talk about is going back to
12 the duty to disclose, and say -- and address the assumptions.
13 One was that there was a duty to disclose; and that is being
14 assumed by Westgate in order to get to its conclusions, and
15 I've assumed it.

16 Even if -- but let's back up, and if we look at
17 it carefully, we will see that there wasn't even a duty to
18 disclose; because the duty to disclose under paragraph 1 has
19 to do with facts that a reasonable person would consider likely
20 to affect an impartiality. There are no facts presented where
21 the likelihood can be deemed within a reasonable person's
22 consideration.

23 Therefore, there was not even a duty to disclose by --
24 on the part of Mr. Burbidge, obviously. I think the situation,
25 although Westgate wishes to portray the opposite inference, the

1 situation and the facts relating to it can be inferred the
2 opposite.

3 Richard Burbidge did not think there would have been
4 any kind of relationship with George Burbidge, or he would have
5 disclosed it. So an inference can be made that the fact that
6 he didn't disclose it was an indication from him that he saw no
7 likelihood of that first cousin relationship being a likelihood
8 of affecting his partial -- impartiality.

9 Certainly the same on our part; if we would have ever
10 suspected that there was any kind of a relationship between
11 Richard Burbidge and George Burbidge, or anyone else on our
12 firm, for that matter, we would have disclosed it. In fact,
13 we would not have even appointed Richard Burbidge. So there's
14 two sides of those inferences; and the presumption now fails
15 once we're dealing in the evidence.

16 So we would suggest the duty does not even arise
17 on the part of Richard Burbidge, or arbitrator Burbidge, to
18 even disclose, unless there is such a likelihood; and there
19 is no such evidence. The same goes to a continuing obligation.

20 There is no continuing obligation if you don't have
21 the initial predicate, which is the likelihood of affecting
22 impartiality. So we would also suggest, your Honor, that there
23 wasn't even a duty to disclose; so that there's no basis at the
24 outset for a vacation of the award.

25 Now, there is some suggestion, and it's argued both

1 in (inaudible) and explicitly by Westgate, that if there
2 was a non-disclosure, our client Westgate did not have the
3 opportunity to consider the matter, and therefore that's the
4 end. We have it vacated.

5 The problem with that is the only remedy that Westgate
6 had, had there been a duty, had there been a disclosure, was to
7 object. Objection doesn't mean that arbitrator Burbidge cannot
8 serve. There then must be a weighing of, okay, what is it?

9 Is there a likely possibility -- or excuse me, a
10 likelihood of impart -- well, let me get the right language
11 -- a likelihood that such a relationship would affect his
12 impartiality? Then there would be a factual finding at that
13 point in time; and if there wouldn't have been, we would have
14 -- even if there had been a disclosure and objection, we'd
15 still be in the same situation we are today.

16 So it is not a correct assumption. It's a giant leap
17 over a gulf which cannot be made. To simply state, "Because
18 it wasn't disclosed, therefore we vacate the award." We still
19 must look at the merits, and that is exactly why subsection (4)
20 under Section 13 -- 113 was put in by the Legislature. That
21 is if there's not a disclosure, the Court may vacate, but
22 there still has to be some kind of evidence of a special
23 relationship.

24 That is exactly what took place in the case that was
25 addressed in the ethics opinion by the bar, where a Judge had a

1 relationship of first cousin with the sheriff, and there was an
2 issue raised that that -- there should be a recusal. The bar
3 made it very clear that first cousin alone is not sufficient to
4 create a basis for recusal.

5 In fact, if I can refer to that opinion, which is
6 attached both I think to our memorandum in opposition to the
7 motion to vacate, Exhibit 6, the bar stated, referring to the
8 third-degree relationship, which this cousin relationship would
9 be, but would not disqualify him if a cousin were a party or a
10 lawyer to the proceeding. Then it goes on to say it would if a
11 close personal relationship exists.

12 Again, the focus isn't on a cousin relationship. It
13 is on the close personal relationship. That's the -- what the
14 basis was in that case. Frankly, the standards applicable
15 to Judges in motions to recuse seems to be far greater than
16 standards that were applied to arbitrators. If it would apply
17 such to Judge, it certainly would apply with greater force to
18 an arbitrator.

19 So we still -- no matter what happens, we get back
20 to the central issue, was there a close personal relationship
21 between George Burbidge and Richard Burbidge? There was not.
22 The evidence is clear. There is nothing but a presumption,
23 which is clearly now packed and behind us; and therefore
24 there's no basis for a vacation.

25 THE COURT: Okay.

1 MR. HUMPHREYS: Now, if I may, your Honor, I'd like to
2 address the Court's questions, unless you have questions about
3 what I just argued?

4 THE COURT: I don't.

5 MR. HUMPHREYS: The Court has raised some questions,
6 and I will now address, first of all, who won; what were the
7 facts; how does -- how does the Court interpret the arbitration
8 award for purpose of determining prevailing party.

9 Though this has been addressed, I think we need
10 to maybe get a better focus on it. If you will look at the
11 arbitration award, which is attached as exhibits to both memos,
12 I think we have three different copies of that arbitration
13 award attached.

14 On page 4, the arbitrators state there were 208
15 claimants -- claimant couples. They treat the couples
16 collectively. Out of those 208, they found on page 8, 131
17 had been actually injured, and they awarded the \$500 for the
18 lost trip, for each of the 131.

19 Now, as Counsel correctly stated, the real fight in
20 this case has always been liability. That's where all of the
21 effort, and time, expense went into this, was establishing
22 liability.

23 All three arbitrators, including Judge Billings
24 and Paul Felt -- and by the way, even if we were to take
25 Mr. Burbidge out of the picture, we still have a majority,

1 including the arbitrator who was appointed by Westgate, who
2 have determined that there was fraud, there was unlawful
3 activity.

4 They had gone very carefully in multiple page findings
5 of fact and conclusions of law, and carefully outlined all of
6 the facts that support each element of the unlawful pattern --
7 excuse me, pattern of unlawful activity. They have -- that was
8 the major part of the battle.

9 Now, the Court, I am sure, is raising the question on
10 the -- because both sides have asked for attorney's fees as it
11 relates to this proceeding. Now, I think the Court needs to
12 appreciate that the awarding of attorney's fees is a different
13 basis here than it is in the arb -- with the arbitrators. That
14 has not been decided yet by the arbitrators.

15 Now, the reason why is because the award is for the
16 necessity of having to bring it to the Court and to create a
17 judgment. It's not for the purpose of trying to figure out
18 who did what in the underlying arbitration, and who won what
19 and who -- what defenses were won or lost, or what claims were.

20 It has solely to do with the issue of does the winning
21 party, which Westgate clearly was, as Counsel has conceded --

22 MS. PORTER: CPG.

23 MR. HUMPHREYS: -- CPG --

24 THE COURT: CPG.

25 MR. HUMPHREYS: -- clearly was, as Westgate's Counsel

1 has conceded.

2 MR. EPSTEIN: I'll stipulate the other way.

3 MS. PORTER: No.

4 MR. EPSTEIN: (Inaudible).

5 MR. HUMPHREYS: But CPG has had to bring the motion
6 to confirm the award, because of non-payment; and that is the
7 basis and the predicate for awarding of attorney's fees. It
8 hasn't got anything to do with what amount was not paid or
9 awarded by the arbitrators. That is an issue before the
10 arbitrators when they decide how attorney's fees should be
11 awarded in the underlying arbitration.

12 Furthermore, I think it's important to point out,
13 your Honor, that the percentage -- well, CPG did not ask for
14 punitive damages, nor double damages; and I'll explain why.
15 We made it very clear to the arbitrators that the punitive
16 damages had been awarded in the trial before this Court; and
17 in that process there was consideration of many, if not all of
18 the various claimants.

19 Therefore it would be wrong to ask for double damages,
20 which the statute allows for finding under the pattern of
21 unlawful activity statute. It would be wrong to ask for double
22 damages here, and yet claim punitive damages here in this --
23 before this Court.

24 So we told the arbitrators that CPG was not seeking
25 any punitive compensation or award at all in the arbitration

1 because of the punitive damage judgment here. So that's one
2 reason -- or that's another element the Court should consider.

3 All right, let me now address some of the comments
4 made by Counsel as it relates to the question the Court raised;
5 Burbidge is not a common name, would a reasonable party invest-
6 igate or at least look at and make reasonable inquiry, was
7 there an affirmative duty on Westgate?

8 It's interesting that when Westgate argues that
9 there was no such affirmative duty, they would -- it would be
10 unreasonable to suggest such a duty to discover; and why would
11 anyone look at the letterhead to find that? I'm scratching my
12 head saying, "Well, how did they find it?" They found it by
13 looking at our letterhead after the award.

14 It's very clear, Mr. Marder said that just before
15 the motion for attorney's fees was heard, after the award had
16 been made, and findings of fault and wrongful conduct had been
17 made, he said, "The night before that hearing I happened to be
18 looking at a letterhead and I saw Burbidge" -- or not the night
19 before, within a few days before.

20 So I contacted Mr. Humphreys. I wanted to know -- I
21 wasn't certain, so I contacted George Burbidge. I then emailed
22 the night before and said there is -- "They are cousins, but
23 there's no relationship," and I spelled out some of the facts.

24 Now, I'm scratching my head, saying, if there's no
25 reason for them to look at it at the commencement. Why was

1 there a reason to look at it after the adverse finding? If
2 there was -- if it was so hard, and the assumptions were so
3 clear that you wouldn't have to ever consider that there would
4 be such a relationship because you assumed the party -- or
5 the parties and/or the arbitrators were disclosed, I'm just
6 scratching my head saying, "Well, then how did we get where we
7 are?" Clearly they did have notice of the letterhead.

8 When there is no indication at all by the parties
9 about who they're going to be appointing and what relationship
10 there is, I mean, heavens, I could have disclosed that I know
11 Richard Burbidge, too. He's not a cousin. Have I been against
12 him? Yes. Have I been with him? Yes. I've had cases with
13 him, against him. Have I gone to lunch with him? Yes.

14 Now, is that the kind of thing that I'm required
15 under the statute to disclose? No, because that is the kind
16 of relationship I have with all attorneys, including Mr. Felt
17 and Judge Billings, though I hadn't ever been to lunch with
18 her except during the arbitration, when we had lunch together.
19 Everyone had lunch together, not just me. I need to make that
20 clear.

21 So I think that we're in a very different situation.
22 Clearly Westgate had stipulated to the appointment by each
23 party of one arbitrator. Now, I say-- let me give a background
24 on that. In the order where the Judge granted their motion
25 to arbitrate, we suggested to the Court, and we discussed

1 with Counsel that procedure of having each party select one
2 arbitrator, and have those two select a third. It was agreed
3 upon by both sides.

4 The Court didn't decide that out of the blue, and come
5 up with that. That was something that was discussed between
6 Counsel, and we both agreed. In fact, we designated our first
7 -- our arbitrator first. The Court gave us 20 days in which to
8 do so. Westgate requested an extension of that, because who
9 they were looking at, which ended up being Judge Billings, was
10 out of town or something. We --

11 MR. EPSTEIN: No, she was still serving.

12 THE COURT: She was still serving.

13 MR. HUMPHREYS: Oh, you're right. You're right. I --

14 MR. EPSTEIN: She got continued over, because --

15 MR. HUMPHREYS: There it is.

16 MR. EPSTEIN: -- you apparently -- you may remember. I
17 hate to interrupt, but it --

18 THE COURT: I do.

19 MR. EPSTEIN: -- was an interesting story, where her
20 replacement was rejected. So she ended up having to work
21 overtime, if you will.

22 MR. HUMPHREYS: That's right.

23 THE COURT: My understanding --

24 MR. EPSTEIN: That's what it was.

25 THE COURT: -- it was rejected by the --

1 MR. HUMPHREYS: You have refreshed my memory on it.

2 THE COURT: -- by the Senate, chosen by --

3 MR. EPSTEIN: By the Senate.

4 THE COURT: -- chosen by -- selected by the Governor,
5 but rejected ultimately by the Senate.

6 MR. EPSTEIN: Exactly so.

7 THE COURT: And a withdrawal.

8 MR. EPSTEIN: And a very unusual scenario.

9 MR. HUMPHREYS: Okay, so in any event, this was not a
10 situation where the parties had not say in how the arbitrators
11 would have been selected.

12 Now, one final comment -- oh, by the way, let me
13 finish the questions the Judge raised. As it related to your
14 recitation of the parties' positions and arguments, we're
15 satisfied the Court accurately addressed those in preliminary
16 statement.

17 The Court during Westgate's argument raised the
18 question of what about costs paid to the arbitrators? It
19 may be worthwhile, your Honor, to note that each party has
20 paid \$75,000 to the arbitrators. Arbitration may be speedy,
21 but it is not inexpensive. It was a huge expense for both
22 sides to employ the three arbitrators, all of -- all three
23 of which charged I think a collective rate of \$350 an hour.

24 Now, maybe not all of that \$150,000 has been used. I
25 think the last accounting indicated there was approximately

1 20,000 that had not yet been used by the arbitrators, but still
2 held in trust; but we still have pending matters. So we're not
3 sure whether we're going to see anything or have a bill at the
4 end for additional time.

5 Those are significant costs; but those costs are
6 issues to be awarded and decided by the arbitrators, not this
7 Court, again, because I think this Court is limited to the
8 attorney's fees and expenses associated with that.

9 THE COURT: I asked the question because potentially
10 the issue of attorney's fees could exceed the award. Not --

11 MR. HUMPHREYS: Right, that's --

12 THE COURT: -- you know, not the attorney's fees issue
13 of the award, but could exceed the award; could it not?

14 MR. HUMPHREYS: You mean, before --

15 THE COURT: I mean --

16 MR. HUMPHREYS: -- this Court or the arbitrators'
17 attorney's fees?

18 THE COURT: Between -- before the arbitrators. I mean,
19 if you each paid \$75,000 to the arbitrators, and you get an
20 award of \$65,000.

21 MR. HUMPHREYS: The costs alone will exceed the award.
22 There's no doubt about that.

23 THE COURT: Yeah.

24 MR. HUMPHREYS: And the claim for attorney's fees, as
25 Counsel has argued, is --

1 THE COURT: Still.

2 MR. HUMPHREYS: -- many times that amount.

3 MR. EPSTEIN: Yes.

4 MR. HUMPHREYS: That's not uncommon in civil rights
5 cases. Oftentimes there's very little compensation, but the
6 whole issue is attorney's fees, and the ultimate finding by
7 the Court of whether there was a violation of civil rights or
8 something such as that. So that's an not uncommon situation,
9 but your observation is correct.

10 All right, now on a final note, may I suggest this.
11 Westgate has made a big issue of the fact that arbitrator
12 Burbidge was neutral -- the, quote, "neutral arbitrator."
13 All three were. In so arguing, they have used the general
14 definition of neutral, meaning someone has -- is independent
15 of everything, like a Judge would be in our case, or a jury
16 would be in our case.

17 The statute is not clear exactly what it meant by "the
18 neutral arbitrator;" but the Section 112, which I also gave to
19 the Court, does ref -- again identify a neutral arbitrator in
20 subsection (b). In subsection -- or did I -- or should I say
21 (2)? Let me look. Subsection (a) of 112 talks in terms of
22 agreements and procedures, and what happens if there's no
23 agreement and the Court has to decide.

24 So -- but it doesn't define who the neutral arbitrator
25 is; but it's very clear when you read the text of the statute,

1 that a neutral arbitrator is someone different. It's not any
2 arbitrator. I think the only reading that makes any sense when
3 you read it that way, or when you look at it, this issue, is
4 that party appointed arbitrators aren't the neutral arbitrator.
5 Only the -- an arbitrator either chosen by the Court, chosen by
6 the two Court appointed arbitrators, or if there's a procedure
7 in place agreed in the agreement that outlines who it's going
8 to be that's independent of the parties' choice, then that
9 person becomes a neutral.

10 So I think it is an improper assumption to say that
11 every arbitrator is a neutral, or you get absurd results;
12 because if that isn't the case, then by definition you are
13 having arbitration awards by partial non-neutral arbitrators.
14 That is not -- you can't stretch the general definition of
15 neutral, and apply it to everybody.

16 There has to be a reason why they are using the word
17 "neutral arbitrator." It's not so much a descriptive as it
18 is a designating arbitrator, as a person who is not party
19 appointed. That is the mechanism that is neutral.

20 It is not necessarily the neutrality of the state of
21 mind of the arbitrator, if you were to do it. Otherwise, every
22 arbitration would be subject to attack, suggesting that they
23 weren't neutral, or they were Court appoint -- excuse me, party
24 appointed. Therefore they had some tie with the plaintiffs, or
25 the plaintiff's Counsel.

1 So I think a fair reading restricts the meaning of the
2 statute to either Court appointed or a non-party appointed
3 arbitrator as being the neutral.

4 THE COURT: Okay.

5 MR. HUMPHREYS: Thank you.

6 THE COURT: Mr. Epstein.

7 MR. EPSTEIN: Thank you, your Honor. This is where
8 the arbitrator's choice -- if you want to call it a choice. I
9 would more consider it their obligation -- to invoke and abide
10 by the triple A code of arbitration, arbitrator ethics, becomes
11 much more important.

12 As we pointed out, as the Court is aware, in the award
13 itself, the arbitrators, all three of them, said they'd govern
14 themselves by the Arbitrator Code of Ethics. What Mr. Humphreys
15 just argued now underscores something that we really didn't
16 argue at all. Maybe it was in a footnote, I think, that if in
17 fact this is true, if in fact that because of the way the
18 arbitrators were appointed, that Mr. Burbidge would not be
19 considered a neutral, under the Utah Arbitration Act, that it
20 is absolutely clear now, by virtue of Mr. Humphreys' construct
21 that Mr. Burbidge has committed a serious offense and violation
22 of the triple A Code of Arbitration Ethics.

23 THE COURT: Well, so has your arbitrator, the one that
24 you designated, simply by virtue of that -- all he's saying is
25 the neutrality issue is a designation -- a specific designation

1 in the statute.

2 MR. EPSTEIN: Our -- we have never taken the position,
3 nor do I believe has Judge Billings ever taken the position
4 that she was anything but neutral under every interpretation
5 or construction of that term.

6 THE COURT: Well, hopefully so; but the fact of the
7 matter is that he -- let me just state on the record. When
8 you give parties an opportunity to select an arbitrator, okay,
9 and that those two arbitrators are then going to designate a
10 third, it may be someone that they've worked with before --

11 MR. EPSTEIN: Sure.

12 THE COURT: -- they've had on panels before, they
13 recognize their professionalism, they recognize their back-
14 ground, they recognize their experience, they recognize perhaps
15 their past judicial positions or appellate positions, or et
16 cetera. So they take all of that into account.

17 I don't think an arbitrator under those circumstances
18 has to say, "Listen, for the last 15 years I have arbitrated
19 the following cases in connection with attorneys out of that
20 firm, and here are all of the decisions that have been made in
21 connection with that," that type of thing; because I think --
22 you know, I think that the opportunity based upon the Court
23 order to make a designation is an independent designation on
24 the part of both parties.

25 MR. EPSTEIN: Well, I --

1 THE COURT: Keep going.

2 MR. EPSTEIN: No, I agree with you entirely. We're not
3 saying anything different. Those kinds of relationships are
4 inherent in the process --

5 THE COURT: Sure.

6 MR. EPSTEIN: -- and we're not suggesting that that has
7 been a problem here at all. The only relationship that we're
8 pointing to here --

9 THE COURT: Is the familial.

10 MR. EPSTEIN: -- is the familial one. So the fact that
11 we knew one another, we assumed, and rightly so. I think all
12 of us assumed that either Judge Billings or Richard Burbidge
13 knew Paul Felt. Fine. We wouldn't expect that they -- anybody
14 would have a problem with it. I think we all know how that
15 works.

16 Here now is where all of this leads. The arbitrators
17 themselves who now have charged themselves with knowledge of
18 all of the provisions of the triple A Code of Arbitration
19 Ethics now under Mr. Humphreys' construct, CPG's construct,
20 now Mr. Burbidge must deal with Canon (I), Canon (I)(X), which
21 speaks precisely to this scenario.

22 Sub (a), "In some types of arbitration in which there
23 are three arbitrators, it is customary for each party acting
24 alone to appoint one arbitrator. The third arbitrator is then
25 appointed by agreement either of the parties, or of the two

1 arbitrators," precisely what we have here, "or avail in such
2 agreement by an independent institution or individual," which
3 we didn't have.

4 "In tri-party arbitrations to which this covenant
5 applies," and it does apply because the arbitrators made
6 it apply, "all three arbitrators are presumed to be neutral
7 and are expected to observe the same standards as the third
8 arbitrator."

9 So Mr. Burbidge under Mr. -- under CPG's construct,
10 now must fit himself into this provision, which means that he
11 had the same obligation to make disclosures as Mr. Felt did.

12 Then I go on, me, "Notwithstanding this presumption,
13 there are certain types of tri-party arbitration in which it
14 is expected by all parties that the two arbitrators appointed
15 by the parties may be predisposed toward the party appointing
16 them.

17 "Those arbitrators referred to in this code as 'Canon
18 X'" -- Canon Roman Numeral X -- "arbitrators are not to be held
19 to the standards of neutrality and independence applicable to
20 the other arbitrators. Canon X describes the special ethical
21 obligations of party appointed arbitrators who are not expected
22 to meet the standard of neutrality." Now, we don't believe
23 that that occurred here, but that's Mr. (Inaudible) construct.

24 "C) A party appointed arbitrator has an obligation to
25 ascertain as early as possible, but not later than the first

1 meeting of the arbitrators and the parties, whether the parties
2 have agreed that the party-appointed arbitrators will serve as
3 neutrals, or whether they shall be subject to Canon X; and to
4 provide a timely report of their conclusions to the parties and
5 other arbitrators.

6 Now --

7 THE COURT: Well, yeah, and we go back to the "required
8 by an agreement to be neutral" language, right?

9 MR. EPSTEIN: Well, in the fee agreement which preceded
10 that first meeting, declared themselves to be neutral. Not
11 party agree -- arbitrators, but neutral in this sense of the
12 word. So Mr. Burbidge -- contrary to what CPG is arguing,
13 Mr. Burbidge in fact did comply with the code of ethics by
14 declaring himself to be neutral prior to the first meeting,
15 the first scheduling conference that we had.

16 So CPG's argument falls of its own weight, by virtue
17 of what their own arbitrator in fact did. Mr. Burbidge had a
18 choice. He had two paths. In the fee agreement he could have
19 said, "I'm not a neutral --"

20 THE COURT: No, only -- only part of their argument,
21 not their entire argument.

22 MR. EPSTEIN: No, no, no, the last part.

23 THE COURT: Yeah.

24 MR. EPSTEIN: The last part that Mr. -- Mr. Humphreys
25 had articulated. That last part falls of its own weight,

1 because if Mr. Burbidge was not going to be anything other than
2 the classic archetypal neutral arbitrator, he had an obligation
3 to inform the parties prior to the first scheduling conference
4 that he would be subject to the Canon X disclosures, okay?

5 Now, he didn't do that, so he's not subject to the
6 Canon X disclosures. He's actually subject to the Canon I
7 disclosures, which we've talked about a lot, which basically
8 mirror the disclosures in Section 113 of the Utah arbitration
9 code.

10 Let's also look at what Canon X requires, because
11 this is where the CPG argument again fails. "Canon X requires
12 Canon X arbitrators are expected to observe all of the ethical
13 obligations prescribed by this code, except those from which
14 they are specifically excused; a) obligations of a Canon I.
15 That's a disclosure. Canon X arbitrators should observe all
16 of the obligations of Canon I subject only to the following
17 provisions," and there's a couple of exceptions.

18 Bottom line, it keeps referring back. In our view,
19 Canon X arbitrators are still required to disclose what
20 is involved in this case, even if they were a non-neutral
21 arbitrator. Again, CPG's argument fails because Mr. Burbidge
22 himself --

23 THE COURT: Declared.

24 MR. EPSTEIN: -- excluded himself, declared himself
25 to be a neutral arbitrator early on in the procedure, and

1 therefore subject to all of the provisions of the code, and
2 also subject to the -- all of the provisions imposed upon a
3 neutral arbitrator under the Utah Arbitration Act.

4 Now, the primary thrust of CPG's argument is that a
5 reasonable person is not likely -- I don't want to mis-phrase
6 this -- that a reasonable person would not consider this
7 familial relationship likely to affect the impartiality
8 of the arbitrator in the arbitration proceeding. This is
9 precisely why I made my observations at the beginning of this.

10 Mr. Humphreys' argument is a greater argument by a
11 great lawyer. It is not an argument that will be made by his
12 client. His client would say, "Wait a second. Are you out of
13 your mind? This guy's cousin is in that firm over there, and
14 he could possibly make money on this. I'd want to know that.
15 I'm a reasonable client. I'm entitled to know that."

16 We have to now take ourselves outside the shoes, you
17 know, that we're wearing, you know, that are the byproduct of
18 20 or 30 or longer years of being lawyers, and being skeptical,
19 you know, and cynical about many -- too many things, and put
20 ourselves in the shoes of a person who is just basically
21 innocently believing that these proc -- that this process is
22 not susceptible to these kinds of involvements, without them at
23 least knowing about it.

24 So I think we are missing the point of the statute
25 by saying that -- just declaring as a matter of law that no

1 reasonable person would think this likely to affect the
2 impartiality.

3 The only way that one could ever determine whether it
4 would likely affect the impartiality of the arbitrator is to
5 do what Westgate was denied the ability to do; and that is to
6 investigate before determining whether it was likely to affect
7 the impartiality.

8 Again, you draw the conclusion, and then you go back
9 and say, "Because I've already drawn this conclusion, you no
10 longer have the right to even ask the question." That's the
11 flaw in the argument. Is it the same person, Richard Burbidge,
12 is making the decision as to whether Westgate would be likely
13 to consider this to be important, and then at the same time
14 whether to disclose it in the first instance.

15 You've got a self-contained little operation here.
16 Is it the same person who has to make the disclosure, gets to
17 decide whether to make the disclosure by determining them own
18 -- their own selves whether this is likely to be important to
19 some other person who they most clearly are not.

20 Nobody else has come in here and said -- other than
21 Richard Burbidge -- and said that "This isn't likely to affect
22 my impartiality." Mr. Burbidge is certainly not the reasonable
23 person contemplated by the statute. The reasonable person
24 contemplated by the statute is not a reasonable person serving
25 as an arbitrator, but a reasonable person serving as a parti-

1 cipant, as a party in the arbitration process.

2 That's where their argument, again, fails of its
3 own weight. They can't say that a reasonable party wouldn't
4 consider this important. They're only saying that Richard
5 Burbidge himself didn't consider it important, because -- I
6 won't say he's estranged from his cousin, but certainly there
7 seems to be elements of that.

8 That's missing the point. He doesn't get to make that
9 decision. The party gets to make that decision; and the party
10 here was denied its absolute right under the statute to make
11 that decision. It's a circular argument.

12 It's a totality, in essence; and it completely guts
13 the obligation to disclose, if you give the party who ha -- the
14 arbitrator who has that obligation the right to evaluate the
15 meaningfulness of the disclosure in the first instance. What's
16 the point of disclosure if you're going to give the arbitrator
17 the right to vet what they have to disclose?

18 That totally renders the entire disclosure process
19 meaningless, when it is always going to be through the filter
20 of the arbitrator. This is unfiltered, unvarnished disclosure.
21 Nothing in the code of ethics, nothing in the comments to the
22 Uniform Arbitration Code, nothing suggests that there ought to
23 be some sort of test applied by the arbitrator themselves as to
24 whether this is worthy of disclosure or not, based upon their
25 own view or vision.

1 THE COURT: That's what we do all the time. That's
2 what Judges do all the time --

3 MR. EPSTEIN: That's what Judges do.

4 THE COURT: -- as it relates to the issues of recusal.
5 We make a threshold determination whether -- and I always do
6 it in terms of liberality relative to the issue of potential
7 conflict, and bring it up. I don't care whether it's 25 or 30
8 years ago. I brought one up two weeks ago that I represented
9 this -- this client on a collection case under \$250 35 years
10 ago. Now, parties can make a determination as it relates to
11 that issue, and that's what they did.

12 MR. EPSTEIN: Your Honor, if I may, and this is not
13 intended to be impertinent, but you weren't told by one of the
14 parties, "Wait a second, 35 years ago you represented me." You
15 disclosed that to them.

16 THE COURT: I did disclose it.

17 MR. EPSTEIN: You brought it up.

18 THE COURT: But --

19 MR. EPSTEIN: That's the way it's supposed to work.

20 THE COURT: Yeah, but let's say there was a failure
21 to disclose as it related to that issue when we proceeded,
22 and then there happened to be a judgment against one party or
23 another, and someone determined at some stage that 35 years ago
24 in private case I had a very minor case, a simple collection
25 letter case in connection with one of the parties. Is that a

1 basis upon which they can move to then set aside a judgment in
2 the case, or a jury, or whatever it may be? My goodness.

3 MR. EPSTEIN: The question is the reasonableness of
4 the belief of the party that the Court was somehow biased or
5 prejudiced or influenced by that fact. It's the reasonableness
6 of that belief. You don't go back and question whether it is
7 in fact true or not.

8 Remember, when you're asked to recuse yourself, you're
9 not making a determination of whether you are or not biased or
10 prejudiced. You're making an evaluation about whether the
11 party has made an adequate showing of a reasonable belief that
12 the Court may be biased or prejudiced. That belief can only be
13 established by knowing what the facts are. You're never going
14 to put yourself in the shoes of the individual party, and say,
15 "Your belief is unreasonable," you know.

16 THE COURT: Okay.

17 MR. EPSTEIN: You have to evaluate it from a different
18 standard; and here --

19 THE COURT: Okay, let's just wrap up.

20 MR. EPSTEIN: -- that's not the standard.

21 THE COURT: You followed up on my question.

22 MR. EPSTEIN: Okay, let me just -- I've got my notes
23 here. If I could make, you know, another comment. We're
24 debating this issue of the letterhead. I think all of us fall
25 into this -- this little trap of kind of forgetting about how

1 we actually operate every single day, how much paper goes
2 through our desk.

3 The Court, you've told us before, there's no way, and
4 you know there's no way, that you're looking at and studying
5 every word on every page of every piece of paper that is in
6 front of you. You know what's important, you know what is
7 surplusage, you look at the important stuff, you (inaudible).

8 The fact of the matter is, Mr. Marder said it I think
9 very well, he had never really looked at their letterhead, and
10 he just happened to catch it, and see, wait a second, because
11 we had such a huge volume of email, huge volume of email. Of
12 course, that doesn't have any of that kind of specifics. I
13 mean, it's not right or wrong. It just happens to be true.

14 You know, I don't -- I don't -- you know, again, I
15 think it's irrelevant, because it now presupposes there's
16 some sort of duty to investigate, and some sort of inquiry
17 notice, which we've already argued, I think, you know, I think
18 very strenuously that there is none. That turns the whole
19 disclosure process on its head; but again, that's the way it
20 is in real life, and I think Rich can really appreciate that as
21 well.

22 THE COURT: Okay, thank you, Counsel.

23 MR. EPSTEIN: Thank you, your Honor.

24 THE COURT: It's 10 minutes to 5. It's been a long
25 day. I frankly had anticipated that I would announce the

1 decision from the bench today; but it involves an articulation
2 relative to the issues of the applicable statutes, et cetera,
3 in some great detail. The decision, frankly, may be appealed
4 one way or the other, and I think it ought to be in writing.
5 I'll do that within a period of 60 days. Nice to see you
6 again, Counsel.

7 MR. EPSTEIN: Always, your Honor. Thank you.

8 THE COURT: Nice to -- nice to have you here.

9 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

That I have authorized Wendy Haws to prepare said transcript, as an independent contractor working under my license as a certified court reporter appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

Wendy Haws
Certified Court Transcriber

WITNESS MY HAND AND SEAL this 25th day of August 2010.

My commission expires:
February 24, 2012

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

Exhibit 3

**Letter on Christensen & Jensen Letterhead
to Westgate Resorts Ltd.'s Counsel (11/26/2008)**

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November 26, 2008

Via email and U.S. Mail

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Re: *Consumer Protection Group v. Westgate Resorts Ltd.*

Your File No. 00108.1230

Our File No. SADEL A9417

Dear Counsel:

Pursuant to the court's order regarding arbitration, Consumer Protection Group hereby appoints as an arbitrator, Richard D. Burbidge of Burbidge Mitchell & Gross, 215 South State Street, Suite 920, Salt Lake City, UT 84111

We will look forward to the name of the arbitrator appointed by Westgate. We understand that those two will then appoint the third arbitrator. Once appointed, I will prepare a

CHRISTENSEN & JENSEN, P.C.

Re. Consumer Protection v. Westgate

November 26, 2008

Page 2

statement of claim that I will submit to them. You can then respond. We can then have a scheduling conference to determine dates and parameters of discovery.

Sincerely yours,

CHRISTENSEN & JENSEN, P.C.

L. Rich Humpherys

Cc Richard D. Burbidge